

**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.)

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Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

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BILL: SB 2082

INTRODUCER: Governmental Oversight and Accountability Committee

SUBJECT: OGSR/Florida Workers' Compensation Joint Underwriting Association

DATE: February 2, 2012      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Seay	Roberts	GO	<b>Favorable</b>
2.			BI	
3.				
4.				
5.				
6.				

**I. Summary:**

This bill is the result of the Governmental Oversight and Accountability Committee's Open Government Sunset Review of the public records and meetings exemption for certain records and meetings held by the Florida Workers' Compensation Joint Underwriting Association, Inc. (JUA). This public records and meetings exemption is subject to the Open Government Sunset Review Act, s. 119.15, F.S., and will expire October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature. This bill reenacts the public records exemption. The bill also removes redundant language currently in the exemption.

Section 627.3121, F.S., currently provides that certain records and meetings held by the JUA are confidential and exempt from the public records requirements found in s. 119.07(1), F.S. and Article I, Section 24(a) of the Florida Constitution, and from the public meetings requirements found in s. 286.011, F.S., and Article I, Section 24(b) of the Florida Constitution. The public records and meetings exemption specifies circumstances under which the protected information may be disclosed.

This bill substantially amends section 627.3121 of the Florida Statutes.

## II. Present Situation:

### Florida's Public Records and Public Meetings Laws

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.<sup>1</sup> 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.<sup>2</sup> 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,<sup>3</sup> which pre-dates the current State Constitution, 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 copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency<sup>4</sup> 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>5</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,

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<sup>1</sup> Section 1390, 1391 Florida Statutes. (Rev. 1892).

<sup>2</sup> Article I, s. 24, Fla. Constitution.

<sup>3</sup> Chapter 119, F.S.

<sup>4</sup> 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."

<sup>5</sup> Section 119.011(12), F.S.

communicate, or formalize knowledge.<sup>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>7</sup>

Article I, s. 24 of the State Constitution also provides that 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 III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution. In addition, the Sunshine Law, s. 286.011, F.S., provides that 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 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.

Only the Legislature is authorized to create exemptions to open government requirements.<sup>8</sup> 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.<sup>9</sup> A bill enacting an exemption<sup>10</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>11</sup>

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

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

The Open Government Sunset Review Act (the Act)<sup>14</sup> provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act or the Sunshine Law. 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.

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

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

<sup>8</sup> Art. I, s. 24(c), Fla. Constitution.

<sup>9</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>10</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>11</sup> Art. I, s. 24(c), Fla. Constitution.

<sup>12</sup> Attorney General Opinion 85-62.

<sup>13</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>14</sup> Section 119.15, F.S.

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 is 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 that 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;
- 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
- 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.<sup>15</sup>

The Act also requires the Legislature to consider 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?

While the standards in the Act may appear to limit the Legislature in the exemption review process, those aspects of the Act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.<sup>16</sup> The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

... notwithstanding s. 778.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

### **Florida Workers' Compensation Joint Underwriting Association, Inc.**

The Florida Workers' Compensation Joint Underwriting Association, Inc. (JUA), created by the Legislature in 1993, is a nonprofit, self-funding entity that is the insurer of last resort for

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<sup>15</sup> Section 119.15(6)(b), F.S.

<sup>16</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

employers who are unable to secure workers' compensation insurance coverage in the voluntary market.<sup>17</sup> The JUA board consists 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; one person appointed by the largest property and casualty insurance agents' association; and the Consumer Advocate for the Department of Financial Services.<sup>18</sup>

The Office of the Attorney General has previously stated that other joint underwriting associations are subject to public records requirements.<sup>19</sup> The Attorney General's Office has opined that residual markets are "agencies" as defined in Ch. 119, F.S., and are accordingly subject to provisions of the Sunshine Law in Ch. 286, F.S., unless specifically exempted from the provisions.<sup>20</sup>

### **Public Records and Meetings Exemption Under Review**

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

- Underwriting files, except that a policyholder or an applicant is authorized access to his or her own underwriting files;
- Claims files until the termination of all litigation and settlement of all claims arising out of the same accident, except that portions of the claims files may remain confidential or exempt if otherwise provided by law;
- 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;
- Medical records, which include information relating to the medical condition or medical status of an individual;
- All records relative to the participation of an employee in an employee assistance program, except as otherwise provided in s. 440.102(8);
- 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.;
- A public record prepared by an attorney retained by the association to protect or represent the interests of the association or prepared at the attorney's express direction, that reflects a

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<sup>17</sup> Florida Workers' Compensation Joint Underwriting Association, Inc., <http://www.fwcjua.com/> (last visited Jan. 18, 2012).

*See also* section 627.311(5)(a), F.S.

<sup>18</sup> Section 627.311(5)(b), F.S.

<sup>19</sup> *See* Attorney General Opinion 94-32.

<sup>20</sup> *Id.*

mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association.

- That portion of a meeting of the association’s board of governors or any subcommittee thereof at which exempt records are discussed; all exempt portions must be recorded and transcribed and preserved for a minimum of 5 years; and
- The transcript and minutes of exempt portions of meetings at which confidential and exempt records are discussed until termination of all litigation and settlement of all claims with regard to that claim.

Based on an Open Government Sunset Review of this exemption, Senate professional staff of the Governmental Oversight and Accountability Committee recommended that the Legislature retain the public records and meetings exemption established in s. 627.3121, F.S. The recommendation was made in light of the information gathered for the Sunset Review, which indicated that a public necessity continues to exist in maintaining the exemption in order to promote the efficient and effective administration of a governmental program, to protect information of a sensitive personal nature concerning individuals, and to protect information of a confidential nature concerning entities. The Sunset Review also recommended amending s. 627.3121(1)(e) from its current language to “medical information” to remove superfluous language. Additionally, use of the term “medical information” is more consistent with definitions in other statutory provisions.

### III. Effect of Proposed Changes:

**Section 1** amends s. 627.3121, F.S., reenacts and saves from repeal the public records and meetings exemption for the Florida Workers’ Compensation Joint Underwriting Association; removes superfluous language to create the term “medical information.”

**Section 2** provides an effective date of October 1, 2012.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

#### B. Public Records/Open Meetings Issues:

This bill retains an already-existing public records and meetings exemption and thus is not subject to the requirement that the exemption must pass with a two-thirds vote of both houses of the Legislature. The bill complies with the requirement of Article I, section 24 of the State Constitution that public records and meetings exemptions may only be addressed in legislation separate from substantive changes in law.

#### C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

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.