

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 Committee on Ethics and Elections

BILL: SB 506

INTRODUCER: Banking and Insurance Committee

SUBJECT: OGSR/Florida Insurance Guaranty Association

DATE: January 30, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Roberts	Roberts	EE	Pre-meeting
2.			GO	
3.			RC	

I. Summary:

SB 506 is the result of an Open Government Sunset Review (OGSR) by the Banking and Insurance Committee staff of a public records exemption for certain information held by the Florida Insurance Guaranty Association (FIGA). The FIGA provides a mechanism for the payment of claims of insolvent property and casualty insurance companies in Florida.¹

Current law provides that the following records are confidential and exempt, with prescribed limitations:

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

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2014, unless reenacted by the Legislature. This bill reenacts the exemption and does not expand the scope of the public records exemption.

II. Present Situation:

Public Records Laws

The Florida Constitution provides every person the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or

¹ Section 631.55, F.S.

employee of the state, or of persons acting on their behalf.² The records of the legislative, executive, and judicial branches are specifically included.³

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act⁴ guarantees every person's right to inspect and copy any state or local government public record⁵ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁶

Only the Legislature may create an exemption to public records requirements.⁷ Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.⁸ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions⁹ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹⁰

Open Government Sunset Review Act

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹¹ The Act requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹²

² FLA. CONST., art. I, s. 24(a).

³ *Id.*

⁴ Chapter 119, F.S.

⁵ Section 119.011(12), F.S., defines "public records" 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." Section 119.011(2), F.S., defines "agency" to mean as "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 Public Records Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)).

⁶ Section 119.07(1)(a), F.S.

⁷ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential and exempt*. A record classified as exempt from public disclosure may be disclosed under certain circumstances (*see WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 2004); and *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991)). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption (*see Attorney General Opinion 85-62*, August 1, 1985).

⁸ FLA. CONST., art. I, s. 24(c).

⁹ The bill may, however, contain multiple exemptions that relate to one subject.

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

¹² Section 119.15(3), F.S.

The Act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary to meet such public purpose.¹³ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- It protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision; or
- It protects trade or business secrets.¹⁴

The Act also requires specified questions to be considered during the review process.¹⁵

When reenacting an exemption that will repeal, a public necessity statement and a two-thirds vote for passage are required if the exemption is expanded.¹⁶ A public necessity statement and a two-thirds vote for passage are not required if the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception¹⁷ to the exemption is created.¹⁸

Florida Insurance Guaranty Association

The Florida Insurance Guaranty Association (FIGA) 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. 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

¹³ Section 119.15(6)(b), F.S.

¹⁴ *Id.*

¹⁵ Section 119.15(6)(a), F.S. The specified questions are:

- 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?

¹⁶ An exemption is expanded when it is amended to include more records, information, or meetings or to include meetings as well as records, or records as well as meetings.

¹⁷ An example of an exception to a public records exemption would be allowing an additional agency access to confidential and exempt records.

¹⁸ See *State of Florida v. Ronald Knight*, 661 So.2d 344 (Fla. 4th DCA 1995) (holding that nothing in s. 24, art. I of the Florida Constitution requires exceptions to a public records exemption to contain a public necessity statement).

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."

The FIGA obtains funds to pay claims of insolvent insurance companies, in part, from the liquidation of assets of these companies by the Division of Rehabilitation and Liquidation in the Department of Financial Services. Funds are also generated 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 emergency assessments. The FIGA assesses solvent insurance companies directly for both assessments, and the insurance company is allowed to pass the assessment on to its policyholders.

Public Records under Review

Section 631.582, F.S., 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, settlement, and final closing 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; and
- Records pertaining to matters reasonably encompassed in privileged attorney-client communications.

Claims files contain detailed information about the claim, including personal, sensitive information about the policyholder or claimant. Claims files may also contain information detailing the evaluation of the legitimacy of the claim, and a valuation of the award, if any, that should be made.

The law 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.

The law 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.

Section 631.582, F.S., provides for future review and repeal of the public records exemption on October 2, 2014. Professional staff of the Banking and Insurance conducted a review of the exemption pursuant to the Open Government Sunset Review Act and solicited comments from FIGA and other stakeholders. The FIGA indicated that there is a public necessity to continue to

protect the information, and recommended reenactment of the public records exemption under review. The responses appears to indicate that the exemption is necessary to preserve the confidentiality and privacy of personal information and to maintain the effective and efficient administration of FIGA.

III. Effect of Proposed Changes:

The bill removes the repeal date, thereby reenacting the public records exemption for specified records of FIGA. The effective date of the bill is October 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

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 state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

This bill reenacts but does not expand the scope of an existing public records exemption; therefore, a two-thirds vote of the members present and voting in each house of the Legislature is not required for passage.

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. Statutes Affected:

This bill substantially amends the following section of the Florida Statutes: 631.582.

This bill creates the following sections of the Florida Statutes:

This bill repeals the following sections of the Florida Statutes:

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.