

**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 Committee on Rules

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BILL: CS/SB 7024

INTRODUCER: Rules Committee and Banking and Insurance Committee

SUBJECT: OGSR/Title Insurance Agencies or Insurers/Office of Insurance Regulation

DATE: April 13, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Billmeier</u>	<u>Knudson</u>		<b>BI Submitted as Committee Bill</b>
1.	<u>Ferrin</u>	<u>Ferrin</u>	<u>GO</u>	<b>Favorable</b>
2.	<u>Billmeier</u>	<u>Phelps</u>	<u>RC</u>	<b>Fav/CS</b>

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 7024 continues the existing public records exemption for proprietary business information a title insurance agency or insurer provides to the Office of Insurance Regulation (OIR) by removing the October 2, 2017, repeal date.

The bill also revises the definition of “proprietary business information” to clarify that information that has been publically disclosed is not subject to the exemption and limits the exemption to information specifically cited in statute.

The bill provides an effective date of October 1, 2017.

**II. Present Situation:**

**Public Records Law**

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>1</sup> This applies to the official business of any public body, officer or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.<sup>2</sup>

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<sup>1</sup> FLA. CONST., art. I, s. 24(a).

<sup>2</sup> *Id.*

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.<sup>3</sup> Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.<sup>4</sup> The Public Records Act states that

it is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.<sup>5</sup>

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>6</sup> The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”<sup>7</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>8</sup>

The Legislature may create an exemption to public records requirements.<sup>9</sup> An exemption must pass by a two-thirds vote of the House and the Senate.<sup>10</sup> In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>11</sup> A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.<sup>12</sup>

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”<sup>13</sup> Records designated as “confidential and exempt” may be released by the records custodian only under the circumstances defined by the Legislature.

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<sup>3</sup> The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

<sup>4</sup> Public records laws are found throughout the Florida Statutes.

<sup>5</sup> Section 119.01(1), F.S.

<sup>6</sup> Section 119.011(12), F.S., defines “public record” 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.”

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>8</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>9</sup> FLA. CONST., art. I, s. 24(c).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). See also *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004).

<sup>13</sup> If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

Records designated as “exempt” are not required to be made available for public inspection, but may be released at the discretion of the records custodian under certain circumstances.<sup>14</sup>

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

The Open Government Sunset Review Act (referred to hereafter as the “OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.<sup>15</sup> The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.<sup>16</sup>

The OGSR 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.<sup>17</sup> 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 program, and administration would be significantly impaired without the exemption;<sup>18</sup>
- Releasing sensitive personal information would be defamatory or would jeopardize an individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;<sup>19</sup> or
- It protects trade or business secrets.<sup>20</sup>

The OGSR also requires specified questions to be considered during the review process.<sup>21</sup> In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>22</sup> If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote

<sup>14</sup> *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

<sup>15</sup> Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to section 119.15(2), F.S.

<sup>16</sup> Section 119.15(3), F.S.

<sup>17</sup> Section 119.15(6)(b), F.S.

<sup>18</sup> Section 119.15(6)(b)1., F.S.

<sup>19</sup> Section 119.15(6)(b)2., F.S.

<sup>20</sup> Section 119.15(6)(b)3., F.S.

<sup>21</sup> Section 119.15(6)(a), F.S. The specified questions are:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means?  
If so, how?
5. Is the record or meeting protected by another exemption?
6. Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

<sup>22</sup> FLA. CONST. art. I, s. 24(c).

for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.<sup>23</sup>

### **Title Insurers and Title Agencies Data Submission**

Section 627.782(8), F.S., requires title insurers and title agencies to submit to OIR, on or before May 31 of each year, revenue, loss, and expense data for the most recently concluded year that are determined necessary to assist in the analysis of premium rates, title search costs, and the condition of the Florida title insurance industry.

### **Public Record Exemption under Review**

In 2012, the Legislature made proprietary business information that is provided to OIR by a title insurance agency or insurer confidential and exempt from public disclosure under s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution until such information is otherwise publicly available or is no longer treated by the title insurance agency or insurer as proprietary business information. However, information provided by multiple title insurance agencies and insurers may be aggregated on an industry-wide basis and disclosed to the public as long as the specific identities of the agencies or insurers are not revealed. The exemption defines “proprietary business information” as information that:<sup>24</sup>

- Is owned or controlled by a title insurance agency or insurer requesting confidentiality;
- Is intended to be and is treated by the title insurance agency or insurer as private in that the disclosure of the information would cause harm to the business operations of the title insurance agency or insurer;
- Has not been publicly disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or a private agreement, providing that the information may be released to the public; and
- Concerns business plans, internal auditing controls and reports of internal auditors, reports of external auditors for privately held companies, trade secrets as defined in s. 688.002, F.S., or financial information, including, but not limited to, revenue data, loss expense data, gross receipts, taxes paid, capital investment, customer identification, and employee wages.

The 2012 public necessity statement for the exemption provides that:<sup>25</sup>

The disclosure of information, such as revenue data, loss expense data, gross receipts, the amount of taxes paid, the amount of capital investment, customer identification, and the amount of employee wages paid, could injure a business in the marketplace by providing its competitors with detailed insights into the financial status and the strategic plans of the business, thereby diminishing the advantage that the business maintains over competitors that do not possess such information. Without this exemption, title insurance agencies and title insurers, whose records are generally not required to be open to the public, might refrain from providing accurate and unbiased data, thus impairing the Office of Insurance

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<sup>23</sup> Section 119.15(7), F.S.

<sup>24</sup> Section 626.84195, F.S.

<sup>25</sup> Ch. 2012-207, Laws of Fla.

Regulation's ability to set fair and adequate title insurance rates. Proprietary business information derives actual or potential independent economic value from not being generally known to, and not being readily ascertainable by proper means by, other persons who can derive economic value from its disclosure or use. The Office of Insurance Regulation, in performing its lawful duties and responsibilities, may need to obtain information from the proprietary business information. Without an exemption from public records requirements for proprietary business information provided to the Office of Insurance Regulation, such information becomes a public record when received and must be divulged upon request. Divulgence of any proprietary business information under the public records law would destroy the value of that property to the proprietor, causing a financial loss not only to the proprietor but also to the residents of this state due to the loss of reliable financial data necessary for fair and adequate rate regulation. Release of proprietary business information would give business competitors an unfair advantage and weaken the position in the marketplace of the proprietor that owns or controls the proprietary business information. The harm to businesses in the marketplace and to the effective administration of the ratemaking function caused by the public disclosure of such information far outweighs the public benefits derived from its release. In addition, the confidentiality provided by this act does not preclude the reporting of statistics in the aggregate concerning the collection of data, as well as the names of the title insurance agencies and title insurers participating in the data collection. Such aggregate reported data is available to the public and is important to an assessment of the setting of title insurance premiums.

The exemption will repeal on October 2, 2017, unless reviewed and saved from repeal by the Legislature.

### **Staff Review of the Exemption**

During the 2016 interim, committee staff consulted with OIR staff as part of the Open Government Sunset Review process. OIR staff indicated that the exemption was necessary to encourage candid participation in OIR data collection efforts and recommended reenactment of the exemption. If the exemption were to lapse, OIR staff believes that title insurers and title agencies would be hesitant to submit information to OIR for fear that their competitors would gain access to sensitive business information. OIR staff indicated that it does not collect "customer identification" and therefore would not object to that term being removed as an example of "financial information" within the exemption.

Committee staff recommends reenacting the exemption with revisions. Saving the exemption from repeal is recommended to ensure proprietary business information that could give competition an unfair advantage is kept confidential, and to ensure that OIR is given accurate and unbiased data to facilitate its regulatory functions. Additionally, it should be made clear that information that has been publicly disclosed is not subject to the exemption. Finally, because "customer information" is not collected by OIR, the reference to it should be removed.

**III. Effect of Proposed Changes:**

The bill reenacts the public record exemption for “proprietary business information” provided to the OIR by title insurance agency or insurer.

The bill also revises the definition of “proprietary business information” to clarify that information that has been publicly disclosed is not subject to the exemption. It removes a reference to customer identification because the OIR does not collect such information.

Current law provides that financial information “including, but not limited to” specified information is exempt. The bill removes “but not limited to” to limit the exemption to information specified in statute.

The bill takes effect October 1, 2017.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

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

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public records exemption. The bill does not create or expand a public records exemption, therefore it does not require a two-thirds vote for final passage.

The bill retains the existing public records exemption for the proprietary business information provided to the OIR by a title insurance agency or insurer. The bill complies with the requirements of article I, s. 24 of the State Constitution that public records exemptions may only be addressed in legislation separate from substantive changes to law.

**C. Trust Funds Restrictions:**

None.

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

None.

**B. Private Sector Impact:**

Maintaining the exemption ensures that proprietary business information is kept confidential, and keeps competitors from gaining an unfair advantage.

C. **Government Sector Impact:**

Maintaining the exemption ensures that OIR is given accurate and unbiased data to use during the rate setting process.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Statutes Affected:**

This bill substantially amends section 626.84195 of the Florida Statutes.

IX. **Additional Information:**

A. **Committee Substitute – Statement of Substantial Changes:**

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

**CS by Rules on April 12, 2017:**

- Clarifies that information is not confidential if it has been publicly disclosed;
- Removes customer identification from the types of exempt information because the OIR no longer collects customer information; and
- Narrows the exemption by removing the phrase “but not limited to” from the exemption.

B. **Amendments:**

None.