

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7067 PCB OTA 17-04 A Review Under the Open Government Sunset Review Act
SPONSOR(S): Oversight, Transparency & Administration Subcommittee, Rommel
TIED BILLS: **IDEN./SIM. BILLS:** SPB 7024

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Oversight, Transparency & Administration Subcommittee	11 Y, 0 N	Toliver	Harrington
1) Government Accountability Committee	22 Y, 0 N	Toliver	Williamson

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

Title insurers and title insurance agencies are required to submit to the Office of Insurance Regulation (OIR), by May 31 of each year, data identified by OIR as necessary to assist in the analysis of premium rates, title search costs, and the condition of Florida's title insurance industry. Current law provides that proprietary business information provided to OIR by a title insurance agency or insurer is confidential and exempt from public record requirements 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 bill reenacts the public record exemption, which will repeal on October 2, 2017, if this bill does not become law. The bill also narrows the definition of proprietary business information to limit the types of financial information that may be protected.

The bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)¹ sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.²

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect 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.
- Protect trade or business secrets.³

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.⁴ If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created⁵ then a public necessity statement and a two-thirds vote for passage are not required.

Title Insurance

Title insurance insures owners of real property or others having an interest in real property against loss by encumbrance, defective title, invalidity, or adverse claim to title.⁶ Title insurance is a policy issued by a title insurer that, after performing a search of title, represents the state of that title and insures the accuracy of its search against claims of title defects. It is usually secured by the purchaser of property or an entity that is loaning money on a mortgage. Purchasers of real property and lenders utilize title insurance to protect themselves against claims by others that they are the rightful owner of the property.

Title Insurance Regulation

Under current law, two entities provide regulatory oversight of the title insurance industry: the Department of Financial Services (DFS),⁷ which regulates title agents, and the Office of Insurance Regulation (OIR),⁸ which regulates title insurers, including licensing and promulgating rates. Rates and premiums charged by title insurers are specified by rule by the Financial Services Commission (FSC).⁹

¹ Section 119.15, F.S.

² Section 119.15(3), F.S.

³ Section 119.15(6)(b), F.S.

⁴ Section 24(c), Art. I, FLA. CONST.

⁵ An example of an exception to a public record exemption would be allowing another agency access to confidential and exempt records.

⁶ Section 624.608, F.S.

⁷ Section 20.121, F.S.

⁸ Section 20.121(3)(a)1., F.S.

⁹ Section 627.782, F.S.

Title insurers may deviate from the proscribed rates by petitioning OIR for an order authorizing a specific deviation from the adopted premium.¹⁰

Title Insurers and Title Agencies Data Submission

Title insurers, their direct or retail businesses in the state, and title agencies are required 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.¹¹ The FSC has adopted rules¹² regarding the collection and analysis of the data.¹³ Failure to timely submit the required data to OIR constitutes grounds for DFS to take disciplinary action against the license or appointment of the title insurance agent or agency.¹⁴ Possible sanctions include suspension or revocation of a license or appointment.¹⁵

Public Record Exemption under Review

In 2012, the Legislature created a public record exemption for proprietary business information provided to OIR by a title insurance agency or insurer.¹⁶ The information is confidential and exempt¹⁷ from public record requirements until such information is otherwise publicly available or is no longer treated by the title insurance agency or insurer as proprietary business information.¹⁸ 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.¹⁹

The exemption defines “proprietary business information” as information that:

- Is owned or controlled by a title insurance agency or insurer requesting confidentiality under this section;
- 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.

¹⁰ Section 627.783, F.S.

¹¹ Section 627.782(8), F.S.

¹² Section 627.782(8), F.S.

¹³ See Fla. Admin. Rule 69O-186.013; see also 2017 Title Agencies Data Call, available at <http://www.flor.com/siteDocuments/FloridaTitleAgencyTemplate.pdf> (last visited 3/3/17).

¹⁴ Section 626.8437(11), F.S.

¹⁵ *Id.*

¹⁶ Chapter 2012-207, L.O.F.; codified as s. 626.84195, F.S.

¹⁷ There is a difference between records the Legislature designates exempt from public record requirements and those the Legislature deems 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, 53 (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 1994); *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 statute. (See Attorney General Opinion 85-62, August 1, 1985).

¹⁸ Section 626.84195(2), F.S.

¹⁹ *Id.*

The 2012 public necessity statement for the exemption provides that:²⁰

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 [OIRs] 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. [OIR], 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 [OIR], 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.

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2017, unless reviewed and saved from repeal by the Legislature.²¹

During the 2016 interim, subcommittee 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 was 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.

Effect of the Bill

The bill removes the repeal date thereby reenacting the public record exemption for proprietary business information provided to OIR by a title insurance agency or insurer in response to OIR's data collection efforts. The bill narrows the definition of proprietary business information to limit the types of financial information that may be protected. It removes the reference to "customer identification" as such information does not appear to be "financial information" and to better mirror information OIR collects.

B. SECTION DIRECTORY:

Section 1 amends s. 626.84195, F.S., relating to the confidentiality of information supplied by title insurance agencies and insurers to OIR.

Section 2 provides an effective date of October 1, 2017.

²⁰ Chapter 2012-207, s. 2, L.O.F.

²¹ Section 626.84195(3), F.S.

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:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.