

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7043 PCB GOS 22-09 OGSR/Information Submitted by Insurers/DFS

**SPONSOR(S):** Government Operations Subcommittee, Fabricio

**TIED BILLS:** IDEN./SIM. **BILLS:** SB 7016

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Government Operations Subcommittee	15 Y, 0 N	Villa	Toliver
1) Insurance & Banking Subcommittee	14 Y, 0 N	Fortenberry	Luczynski
2) State Affairs Committee	21 Y, 0 N	Villa	Williamson

### SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record exemption 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.

The Division of Investigative and Forensic Services (DIFS) within the Department of Financial Services (DFS) investigates a wide range of fraudulent and criminal acts and comprises all law enforcement and forensic components residing within DFS. Currently, every insurer admitted to do business in the state must adopt an anti-fraud plan, establish and maintain a designated anti-fraud investigative unit, annually provide education and training to the anti-fraud investigative unit, and report anti-fraud investigative information to DFS.

In 2017, the Legislature created a public record exemption for certain anti-fraud investigative information submitted to DFS by insurers. Specifically, the exemption makes the following information exempt from public record requirements:

- The description of an insurer's anti-fraud education and training.
- The description or chart of an insurer's anti-fraud investigative unit.
- An insurer's rationale for the level of staffing and resources being provided for the anti-fraud investigative unit.
- The number of claims referred to the anti-fraud investigative unit.
- The number of claims investigated or accepted by the anti-fraud investigative unit.
- The number of other insurance fraud matters referred to, investigated by, or accepted by the anti-fraud investigative unit that were not claim related.
- The estimated dollar amount or range of damages on cases referred to DIFS or other agencies.

The bill saves from repeal the public record exemption, which will repeal on October 2, 2022, if this bill does not become law.

The bill does not appear to have a fiscal impact on state government 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)<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup>

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.<sup>4</sup> 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 created, then a public necessity statement and a two-thirds vote for passage are not required.

##### Division of Investigative and Forensic Services

The Division of Investigative and Forensic Services (DIFS) within the Department of Financial Services (DFS) encompasses all law enforcement and forensic components residing within DFS. DIFS investigates a wide range of fraudulent and criminal acts including:

- Insurance fraud;
- Workers' compensation fraud;
- Fire, arson, and explosives investigations;
- Theft/misuse of state funds; and
- Fire and explosives sample analysis.<sup>5</sup>

DIFS is directed to investigate fraudulent insurance acts, violations of the Unfair Insurance Trade Practices Act, false and fraudulent insurance claims, and willful violations of the Florida Insurance Code and rules adopted thereunder.<sup>6</sup> DIFS employs sworn law enforcement officers to investigate insurance fraud. These officers may make warrantless arrests upon probable cause for criminal violations established as a result of an investigation.<sup>7</sup> The general laws applicable to arrests by state law enforcement officers apply to DIFS investigators.

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<sup>1</sup> Section 119.15, F.S.

<sup>2</sup> Section 119.15(3), F.S.

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

<sup>4</sup> Article I, s. 24(c), FLA. CONST.

<sup>5</sup> My Florida CFO, *Investigative and Forensic Services*, available at <https://www.myfloridacfo.com/division/difs/> (last visited January 25, 2022).

<sup>6</sup> See s. 626.989, F.S.

<sup>7</sup> Section 626.989(7), F.S.

### Insurer Anti-Fraud Investigative Units and Plans

Florida law requires every insurer admitted to do business in the state to establish and maintain a designated anti-fraud unit within the company to investigate and report possible fraudulent insurance acts or to contract with others for such services.<sup>8</sup> These insurers are required to file a detailed description of their anti-fraud unit or the contract for services, whichever is applicable, with DIFS.<sup>9</sup> Additionally, the insurers are required to annually provide education and training to the anti-fraud investigative unit and to adopt an anti-fraud plan, which must be filed with DIFS and must include:

- An acknowledgment that the insurer has established procedures for detecting and investigating possible fraudulent insurance acts relating to the different types of insurance written by that insurer;
- An acknowledgment that the insurer has established procedures for the mandatory reporting of possible fraudulent insurance acts to DIFS;
- A description of the required anti-fraud education and training;
- An acknowledgment that the insurer provides the required anti-fraud education and training to the anti-fraud investigative unit;
- A description or chart of the insurer's anti-fraud investigative unit, including position titles and descriptions of staffing; and
- The rationale for the level of staffing and resources being provided for the anti-fraud investigative unit.<sup>10</sup>

Current law also requires every insurer to report fraud related data for each line of insurance written in the prior calendar year. The data must be submitted to DFS by March 1, and include:

- The number of policies in effect;
- The amount of premiums written for policies;
- The number of claims received;
- The number of claims referred to the anti-fraud investigative unit;
- The number of other insurance fraud matters referred to the anti-fraud investigative unit that were not claim related;
- The number of claims investigated or accepted by the anti-fraud investigative unit;
- The number of other insurance fraud matters investigated or accepted by the anti-fraud investigative unit that were not claim related;
- The number of cases referred to DIFS;
- The number of cases referred to other law enforcement agencies;
- The number of cases referred to other entities; and
- The estimated dollar amount or range of damages on cases referred to DIFS or other agencies.<sup>11</sup>

DFS may impose an administrative fine on an insurer that fails or otherwise refuses to comply with the above-described reporting requirements.<sup>12</sup>

### Public Record Exemption under Review

In 2017, the Legislature created a public record exemption for certain anti-fraud investigative information submitted to DFS by insurers.<sup>13</sup> Specifically, the exemption makes the following information exempt<sup>14</sup> from public record requirements:

- The description of an insurer's anti-fraud education and training.

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<sup>8</sup> Section 626.9891(2)(a), F.S.

<sup>9</sup> Section 626.9891(2)(d), F.S.

<sup>10</sup> Section 626.9891(3), F.S.

<sup>11</sup> Section 626.9891(5), F.S.

<sup>12</sup> Section 626.9891(8), F.S.

<sup>13</sup> Chapter 2017-179, L.O.F.

<sup>14</sup> 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. Sch. Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Rivera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 683, 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

- The description or chart of an insurer's anti-fraud investigative unit.
- An insurer's rationale for the level of staffing and resources being provided for the anti-fraud investigative unit.
- The number of claims referred to the anti-fraud investigative unit.
- The number of claims accepted or investigated by the anti-fraud investigative unit.
- The number of other insurance fraud matters referred to, investigated by, or accepted by the anti-fraud investigative unit that were not claim related.
- The number of claims accepted or investigated by the anti-fraud investigative unit.
- The estimated dollar amount or range of damages on cases referred to DIFS or other agencies.<sup>15</sup>

The 2017 public necessity statement<sup>16</sup> for the exemption provides that:

The public disclosure of [information relating to an insurer's anti-fraud investigative unit] would allow criminal elements to use such information to identify fraud prevention or detection strategies employed by insurers and use this information to commit insurance fraud. . . . The public disclosure of [data submitted to DFS] could injure a business in the marketplace by providing its competitors with detailed insights into the claim investigation processes and statistics of the company, thereby diminishing the advantage that the business maintains over competitors that do not possess such information.<sup>17</sup>

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2022, unless reenacted by the Legislature.

During the 2021 interim, the House Government Operations Subcommittee staff conducted an interview with staff from DFS as part of its review under the Open Government Sunset Review Act. According to DFS staff, there are approximately 170 insurers admitted to do business in Florida. The exemption, according to DFS staff, is functioning well and the department has not experienced any difficulties regarding the exemption. DFS staff indicated they were unaware of any litigation concerning the exemption or its interpretation. DFS staff recommended the exemption be reenacted to prevent criminals from obtaining the information and using it to commit insurance fraud as well as to protect insurer's proprietary business information.

### **Effect of the Bill**

The bill removes the scheduled repeal date of the public record exemption, thereby maintaining the public record exemption for certain anti-fraud investigative information submitted to DFS by insurers.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 626.9891, F.S., relating to insurer anti-fraud investigative units.

Section 2 provides an effective date of October 1, 2022.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

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custodian of public records to anyone other than the persons or entities specifically designated in statute. *See Op. Att'y Gen. Fla. 04-09 (2004).*

<sup>15</sup> *See* s. 626.9891(11)(a), F.S.

<sup>16</sup> Article I, s. 24(c), Fla. Const., requires each public record exemption to "state with specificity the public necessity justifying the exemption."

<sup>17</sup> Chapter 2017-179, L.O.F.

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:

The bill does not require rulemaking nor confer or alter an agency's rulemaking authority

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.