The Florida Senate

Interim Project Report 2001-028 *September 2000*

Committee on Banking and Insurance Senator James A. Scott, Chairman

PUBLIC RECORDS EXEMPTION FOR SURPLUS LINES INSURANCE RECORDS FURNISHED TO THE DEPARTMENT OF INSURANCE

(SECTION 626.921(8), FLORIDA STATUTES)

SUMMARY

The public records exemption for certain surplus lines insurance records submitted to the Department of Insurance, as provided by s. 626.921(8), F.S., is scheduled for repeal on October 2, 2001, unless reviewed and reenacted by the Legislature, pursuant to the criteria specified in the Open Government Sunset Review Act, s. 119.15, F.S.

Surplus lines insurance agents are required to submit information about each surplus lines policy written, including the policy, application, address of the insured, premium, and other information, if requested to do so by the Department of Insurance. Such records must be maintained by the agent for 5 years and be available for inspection by the department at any time. Any such records obtained by the department are confidential and exempt from the public records law if the information would reveal a trade secret. In practice, the department requests such information only if an agent is being investigated for a suspected violation.

In 1997, the Legislature created the Florida Surplus Lines Service Office, which assumed the primary responsibility for receiving reports from surplus lines agents. Surplus lines agents are required to report specific information on each policy to the service office. As noted, agents are required to submit records to the department only upon request. However, the current public records exemption applies only to records submitted to the department and does not specifically apply to records submitted to the service office. Based on opinions of the Office of the Attorney General, it appears that the service office is subject to the Public Records Law.

It is recommended that the current public records exemption and confidentiality be retained for surplus lines information that reveals a trade secret submitted to the Department of Insurance. Alternatively, it is recommended that the exemption be made more specific by applying to information that is specific to an individual policy, rather than information that reveals a trade secret, due to the uncertainty as to what information is considered a trade secret. It is also recommended that a new exemption be enacted for surplus lines information submitted to the Florida Surplus Lines Service Office under the same conditions that apply to such information submitted to the Department of Insurance.

BACKGROUND

Constitutional Access to Public Records and Meetings – Article I, s. 24 of the State Constitution provides every person with 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. The section specifically includes the legislative, executive, and judicial branches and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissioners or entities created pursuant to law or the State Constitution.

The term *public records* has been defined by the Legislature in s. 119.011(1), F.S., to include:

> . . . . 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 the official business by any agency.

This definition of *public records* has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official

business which are used to perpetuate, communicate or formalize knowledge. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form. *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records provided that: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

The Open Government Sunset Review Act of 1995 -- Section 119.15, F.S., the *Open Government Sunset Review Act of 1995*, establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years. Further, a law that enacts or substantially amends an exemption must state that the exemption must be reviewed by the Legislature before the scheduled repeal date. 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. An exemption is not substantially amended if the amendment *narrows* the scope of the exemption.

In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd of the 5th year, unless the Legislature acts to reenact the exemption.

In the year before the repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year which meets the criteria of an exemption as defined in the section. Any exemption that is not identified and certified is not subject to legislative review and repeal under the Open Government Sunset Review Act. If the division fails to certify an exemption that it subsequently determines should have been certified, it is required to include the exemption in the following year's certification after that determination.

Under the requirements of the Open Government Sunset Review Act, an exemption is to be maintained only if:

(a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;

(b) The exemption is necessary for the effective and efficient administration of a governmental program; or

(c) The exemption affects confidential information concerning an entity.

As part of the review process, s. 119.15(4)(a), F.S., requires the consideration of the following specific questions:

(a) What specific records or meetings are affected by the exemption?

(b) Whom does the exemption uniquely affect, as opposed to the general public?

(c) What is the identifiable public purpose or goal of the exemption?

(d) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption;

2. Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or

3. Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of

> devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. In addition, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Under s. 119.15(3)(e), F.S., notwithstanding s. 768.28, F.S., 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 an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid reenactment. Further, one session of the Legislature may not bind a future Legislature. As a result, a new session of the Legislature could maintain an exemption that does not meet the standards set forth in the Open Government Sunset Review Act of 1995.

METHODOLOGY

Committee staff reviewed the legislative history of s. 626.921(8), F.S., related amendments to the surplus lines insurance laws, and the plan of operation and agents procedures manual adopted by the Florida Surplus Lines Service Office, and interviewed representatives of the Department of Insurance, the Florida Surplus Lines Service Office, and surplus lines insurers. The exemption under review was examined pursuant to the criteria of the Open Government Sunset Review Act.

FINDINGS

The Surplus Lines Law -- The Florida Insurance Code contains the Surplus Lines Law in ss. 626.913-626.937, F.S. The declared purposes of this law are to provide orderly access for the public to insurers not authorized to transact insurance in this state, through qualified, licensed, and supervised surplus lines agents for insurance coverages not procurable from authorized insurers. Requirements and procedures are established for approval of eligible surplus lines insurers and licensure of surplus lines agents by the Department of Insurance. The law also specifies the conditions that must be met before insurance coverage may be exported to an eligible surplus lines insurer, also referred to as a nonadmitted insurer. These conditions require a diligent effort to place the business with an authorized insurer and require that the premium for the surplus lines policy not be lower than the applicable rate in use by a majority of authorized insurers, and that the policy coverage not be more favorable than under similar contracts in use by a majority of authorized insurers. Surplus lines coverage is not subject to Florida regulation of rates or forms and there is no insurance guaranty fund protection if the insurer becomes insolvent. Surplus lines insurance is subject to a 5 percent premium tax paid by the policyholder to the surplus lines agent in addition to the full premium.

The Florida Surplus Lines Service Office -- Legislation in 1997 created the Florida Surplus Lines Service Office, a nonprofit association to act as a "self-regulating organization" to permit better access by consumers to approved surplus lines insurers. (Ch. 97-196, L.O.F.) A board appointed by the Insurance Commissioner operates the association and the plan of operation must be approved by the Department of Insurance. All surplus lines agents are required to be members of the association as a condition of licensure. Each surplus lines policy sold in Florida is subject to a fee equal to 0.3 percent of the premium to fund the operations of the association, which employs a full-time staff and maintains its office in Tallahassee.

The Florida Surplus Lines Service Office is required to conduct the following activities: receive, record, and review all surplus lines insurance policies; maintain records of the policies reported to the service office and prepare monthly reports for the department; prepare and deliver to each surplus lines agent quarterly reports of the agent's business and collect and remit to the department the surplus lines tax; perform a reconciliation of the policies written in the nonadmitted market, as provided by nonadmitted insurers, with the policies reported to the service office by the surplus lines agents, and submit a report to the department on the results of the reconciliation.

Filing Requirements for Surplus Lines Agents -- Surplus lines agents are required to report and file with the Florida Surplus Lines Service Office such information on each surplus lines insurance policy as required in the plan of operation adopted by the board and approved by the department. [s. 626.921(2), F.S.] The plan of operation specifies that information on policies shall be submitted in a format approved by the department. (Florida Surplus Lines Service Office Plan of Operation and Articles of Agreement, sec. 7). The Agents Procedures Manual, adopted by order of the department, requires agents to submit specific information on each policy, including the name and address of the insured and insurer, the type of coverage,

amount of coverage, the premium, effective date, fees charged, deductibles, and other information. Surplus lines agents are also required by statute to submit a quarterly report to the service office that includes aggregate gross and net premiums and a listing of all policies issued. (s. 626.931, F.S.) The primary purpose served is to determine whether an agent has paid the appropriate surplus lines tax on each policy. In addition, this information enables the department to monitor the surplus lines business to determine whether business is being appropriately exported to the surplus lines market and provides data to measure the state of the admitted market for particular lines of coverage, (for example, the recent review by the department of nursing home coverage).

Surplus lines agents are also required to submit to the Department of Insurance within 30 days of request, copies of requested policies, including applications, certificates, confirmation of insurance coverage, memoranda, and any changes or endorsements. (s. 626.923, F.S.) Such information must be filed only upon request of the department, which is typically done only when the department is investigating an agent for a suspected violation, such as non-payment of the surplus lines tax, misappropriation of funds, or improper placement of business in the surplus lines market.

Surplus lines agents are required to maintain in their agency office for a period of 5 years, open to examination by the department, each surplus lines contract, including applications and certificates, confirmation of coverage, memoranda, and any substitutions or endorsements. This information must include the amount of the insurance and perils insured against; brief general description of property insured and where located; gross premium charged; return premium paid, if any; rate of premium charged upon the several items of property; effective date and terms of the contract; name and address of the insured and the insurer; amount collected from the insured; and other information as may be required by the department. (s. 626.930, F.S.) As noted, the department typically examines this information only when an agent is being investigated for a suspected violation.

Current Public Records Exemption for Information Reported by Surplus Lines Agents; Legislative History -- The information that surplus lines agents submit to the Department of Insurance (upon request) pursuant to s. 626.923, F.S., and the information that is available to inspection by the department under s. 626.930, F.S., as summarized above, is confidential and exempt from the Public Records Law, if the disclosure of the information would reveal a trade secret as defined in s. 688.002, F.S. The exemption does not apply to any proceeding instituted by the department against an agent or insurer. This exemption is scheduled for repeal on October 2, 2001, unless reenacted by the Legislature, after review under the Open Government Sunset Review Act. [s. 626.921(8), F.S.]

Trade secret is defined in s. 688.002(4), F.S., to mean information that "(a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

It may not be clear what information submitted by surplus lines agents is considered a trade secret, but it is believed to apply to information that is specific to an individual policy, as opposed to aggregate information such as quarterly premium and tax reports.

Prior to the creation of the Florida Surplus Lines Service Office in 1997, surplus lines agents were required to submit quarterly reports to the department. [s. 626.931 (1995 Fla. Stat.)] These quarterly reports included aggregate gross and net premiums and a listing of all policies issued. There was no automatic filing requirement for the policy forms themselves or other detailed information about each policy, but an agent was required by s. 626.923 (1995 Fla. Stat.), to file a copy of a policy and provide other specific information upon request of the department, and was required by s. 626.930 (1995 Fla. Stat.) to maintain certain information about each policy subject to examination by the department. The law did not provide a public records exemption for the quarterly reports of aggregate data submitted to the department, but did provide an exemption for the policy specific information submitted to the department pursuant to request under s. 626.923, F.S., or contained in the records subject to examination under s. 626.930, F.S., if the disclosure of the information would reveal a trade secret as statutorily defined.

The 1997 legislation creating the Surplus Lines Service Office amended the statutes to require surplus lines agents to file quarterly reports with the service office, rather than with the department. (s. 626.931, F.S., as amended by s. 4 of ch. 97-196, L.O.F.). Also, the 1997 act amended s. 626.921, F.S., to require surplus lines agents to file with the service office such information on

each policy as required in the plan of operation adopted by the board and approved by the department.

The 1997 act did not provide a public records exemption for the information agents were required to submit to the Florida Surplus Lines Service Office. But, the public records exemption already provided in the law was maintained for information submitted by agents to the *department*, pursuant to request or examination, if disclosure would reveal a trade secret. (This provision was retained in s. 626.921, F.S., which was substantially reworded.) The only change made to this exemption was scheduling it for future repeal and review under the Open Government Sunset Review Act. These provisions have not been further amended and are contained in the current law.

Is the Florida Surplus Lines Service Office a "Public Agency" for purposes of the Public Records Law? – This review raises the question of whether the Florida Surplus Lines Service Office is considered a public agency to which the Public Records Law applies.

Florida case law provides that the Government in the Sunshine Law should be liberally construed to give effect to its public purpose. *See, e.g., Wood v. Marston*, 442 So.2d 934 (Fla. 1983). The Office of the Attorney General has issued numerous opinions advising that if a nonprofit entity is created by law, it is subject to Chapter 119 public records disclosure requirements. (*See, Government in the Sunshine Manual*, 2000 Ed., Office of the Atty. Gen., pp. 57-63.) The Attorney General concludes that the issue is whether the entity is *acting on behalf of* an agency. (*Id.*, p. 60.) One opinion determined that the Florida Windstorm Underwriting Association, a private nonprofit association established pursuant to a plan adopted by the Department of Insurance in accordance with statutory authorization, is subject to the Public Records Law (AGO 94-32).

These opinions indicate that the Florida Surplus Lines Service Office is subject to the Public Records Law. The service office essentially performs a regulatory function on behalf of the department by collecting the data necessary to determine if surplus lines agents are paying the appropriate surplus lines tax and assisting the department in enforcement of other surplus lines laws.

The plan of operation adopted by the service office and approved by the department states, "The Service Office shall comply with Chapter 119, Florida Statutes, and subsequent amendments thereto, to the extent required by law. Information furnished to the Department under Section 626.923 or contained in the records subject to examination by the Department under Section 626.930, Florida Statutes, are confidential and exempt from the provisions of Section 119.07(1), Florida Statutes and Section 24(a), Article I of the Florida Constitution if the disclosure would reveal a trade secret as defined in Section 688.002, Florida Statutes. Any confidentiality asserted by the Service Office does not apply to the Department. All records deemed confidential by the Department of Insurance, as provided herein, are also deemed confidential by the Service Office and shall be treated accordingly. Any confidentiality or privilege asserted by the Service Office shall not be construed as a waiver of any confidentiality or privilege the Department may potentially assert." (Sec. 11)

If the service office is determined to be a public agency subject to the Public Records Law, the next question is whether the current exemption for certain surplus lines records submitted to the department also applies to the service office as an agent of the department. The plan of operation for the service office, quoted above, implies this is the case, but this may not be true. Even if the current exemption applies to the service office, it would be limited to the terms of the exemption, which references only information submitted to the department pursuant to request under s. 626.923, F.S., or contained in the records subject to examination under s. 626.930, F.S. This exemption does not refer to information required to be filed with the service office under s. 626.921(2), F.S., which provides the authority for mandatory reporting to the service office of information on each surplus lines policy sold by an agent.

If the Legislature decides that the current public records exemption should be retained for surplus lines information that reveals a trade secret submitted to the Department of Insurance, it would logically follow that the same information that is submitted to the Florida Surplus Lines Service Office should also be exempt. This would constitutionally require a separate bill from the legislation reenacting the current exemption, because this would expand a current exemption.

Answers to Questions Posed by the Open Government Sunset Act -- Section 119.15(4)(a), F.S., requires as part of the review process the consideration of specific questions.

First, what specific records or meetings are affected by the exemption? If requested by the Department of Insurance, the following records obtained from a surplus lines agent are exempt if such information reveals a trade secret: copies of surplus lines policies, applications, certificates, confirmation of insurance coverage,

memoranda, any changes or endorsements, the amount of the insurance and perils insured against, general description of property insured and where located, gross premium charged, return premium paid, rate of premium charged upon the several items of property, effective date and terms of the contract, name and address of the insured and the insurer, amount collected from the insured, and other information as may be required by the department.

Second, whom does the exemption uniquely affect, as opposed to the general public? Insurance companies and insurance agents.

Third, what is the identifiable public purpose or goal of the exemption? To protect trade secrets of insurers and agents and, secondarily, to protect privacy interests of policyholders.

Fourth, can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how? The information cannot be generally obtained by alternative means by persons other than the parties to the insurance contract and the agent.

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. [*See*, s. 119.15(4)(b), F.S., quoted above, for the specified purposes.] The exemption must be no broader than is necessary to meet the public purpose it serves. Finally, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

The exemption under review best fits under s. 119.15(4)(b)3., F.S., which permits an exemption that protects information of a confidential nature which protects a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace. Insurance companies' lists of policyholders and specific policy information is proprietary in nature and its disclosure to competitor insurance companies could detrimentally affect their business.

RECOMMENDATIONS

Staff recommends that the exemption in s. 626.921(8), F.S., be maintained and reenacted, for surplus lines information that reveals a trade secret submitted to the Department of Insurance. Alternatively, the exemption should be made more specific, by providing that it applies to information that is specific to an individual policy, rather than information that would reveal a trade secret. It may not be clear what information would be considered a trade secret, although it is believed to apply to information that is specific to an individual policy, as opposed to aggregate data, so this change would merely be a clarification.

Staff further recommends that a new exemption be enacted for surplus lines information submitted to the Florida Surplus Lines Service Office, under the same conditions that apply to the exemption for such information submitted to the Department of Insurance.

COMMITTEE(S) INVOLVED IN REPORT ***(Contact first committee for more information.)***
Committee on Banking and Insurance, 404 South Monroe Street, Tallahassee, FL 32399-1100, (850) 487-5361 SunCom 277-5361

MEMBER OVERSIGHT
N/A