

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB JEC 07-06 Florida Workers' Compensation Joint Underwriting Association
Public Records and Public Meetings
SPONSOR(S): Jobs & Entrepreneurship Council
TIED BILLS: **IDEN./SIM. BILLS:** SB 628

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|--|-----------|----------|----------------|
| Orig. Comm.: Jobs & Entrepreneurship Council | 13 Y, 0 N | Callaway | Thorn |
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SUMMARY ANALYSIS

The bill creates an exemption for certain records and portions of meetings of the Florida Workers' Compensation Joint Underwriting Association, Inc. (JUA), the insurer of last resort for employers who are unable to secure workers' compensation insurance coverage in the voluntary market. Portions of underwriting files, claims files, medical records, audit records, proprietary information, attorney-client information, and reports of fraud, among other records, are made confidential and exempt. Exceptions to the exemption are provided. Meetings at which exempt portions of those records are discussed and minutes of those meetings are also made exempt. The bill also provides the constitutionally-required statement of public necessity for the exemption. Further, the bill makes the exemption subject to future review and repeal under the Open Government Sunset Review Act in 2012.

Pursuant to s.24(c), Art. I, of the State Constitution, a two-thirds vote of the members is required for the passage of a newly created public records or public meetings exemption.

This bill has no fiscal impact and is effective July 1, 2007.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill decreases access to public records.

B. EFFECT OF PROPOSED CHANGES:

Public Records

Florida has a long history of providing public access to government records. In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.¹ Article I, s. 24 of the State Constitution, provides that:

(a) Every person² has 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, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. . . .

Unless specifically exempted, all agency records are available for public inspection. The term “public record” is broadly defined 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.³

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.⁴ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁵

Only the Legislature is authorized to create exemptions to open government requirements.⁶ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁷ A bill enacting an exemption⁸ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁹ A bill creating an exemption must be passed by a two-thirds vote of both houses.¹⁰

The Public Records Act¹¹ specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

¹ Article I, s. 24 of the State Constitution.

² Section 1.01(3), F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

³ Section 119.011(11), F.S.

⁴ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁵ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁶ Article I, s. 24(c) of the State Constitution.

⁷ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

⁸ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁹ Art. I, s. 24(c) of the State Constitution.

¹⁰ *Ibid.*

¹¹ Chapter 119, F.S.

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.¹² The records custodian must state the basis for the exemption, in writing if requested.¹³

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.¹⁴ If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹⁵ Further, the confidentiality of that record must be preserved by the statutorily-named entity that is authorized to receive it.¹⁶

If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹⁷ For example, active criminal investigative information is exempt pursuant to s. 119.071(2)(c)1., F.S.¹⁸ Nevertheless, a law enforcement agency may release the description of an alleged perpetrator of a crime to the public. That portion of the exempt criminal investigative information would lose its status as exempt upon release to the public. If, however, a law enforcement agency were to provide exempt information to another law enforcement agency, that would not be released to the public and the information would retain its exempt status in the hands of the receiving entity.¹⁹

The Open Government Sunset Review Act

The Open Government Sunset Review Act²⁰ (the “act”) provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An identifiable public purpose is served if the exemption:

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- [p]rotects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or

¹² Section 119.07(1)(b), F.S.

¹³ Section 119.07(1)(c) and (d), F.S.

¹⁴ *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5th DCA), rev. denied 892 So.2d 1015 (Fla. 2004).

¹⁵ *Ibid* at 53; *see also*, Attorney General Opinion 85-62.

¹⁶ *Ragsdale v. State*, 725 So.2d 203 (Fla. 1998).

¹⁷ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁸ Criminal investigative information is considered “active” as long as it is related to an ongoing investigation which is continuing with a reasonable good faith anticipation of securing an arrest or prosecution in the foreseeable future. In addition, it is considered “active” while it is directly related to pending prosecutions or appeals.

¹⁹ *City of Riviera Beach v. Barfield*, 642 So.2d 1135, 1137 (Fla 4th DCA 1994).

²⁰ Section 119.15, F.S.

- [p]rotects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.²¹

The act also requires consideration of the following:

- 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 yes, 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?

Florida Workers' Compensation Joint Underwriting Association (JUA)

In 1993, the Legislature created the JUA as a nonprofit, self-funding entity, governed by a nine-member board, to act as an insurer of last resort for employers unable to secure workers' compensation insurance in the voluntary market.²² The board of this residual market is comprised of three members appointed by the Financial Services Commission; two members representing the top 20 domestic insurers writing workers' compensation; two members representing the top 20 foreign insurers writing workers' compensation; one person appointed by the largest property and casualty insurance agents' association; and the Consumer Advocate for the Department of Financial Services.

Applicability of the Public Records Law to Residual Markets

Historically, the public records law has been held to apply to private entities, including residual markets or joint underwriting associations, created by law or by public agencies, unless specifically exempted by law. Section 119.01, F.S., requires that records made or received in connection with the transaction of official business by an agency must be open for inspection in the absence of a statute exempting the record or making it confidential. The law defines the term, "agency," to include any authority, board, commission, or other separate unit of government, *created or established by law* and any other public or private agency, person, partnership, corporation, or business entity, acting on behalf of any public agency.²³ Section 286.011, F.S., relating to public meetings and records provides that all meetings of any board of any state agency or authority at which official acts are to be taken are open to the public, unless exempted.

The Office of the Attorney General has opined that other joint underwriting associations, such as the former Florida Windstorm Underwriting Association and the Residential Property and Casualty Joint Underwriting Association, are subject to public records laws. The Attorney General's Office has opined that residual markets are "agencies" as defined in ch. 119, F.S., and are accordingly, subject to the provisions of the Government-in-the-Sunshine Law, unless specifically exempted from the provisions.²⁴

Consistent with the public record laws, s. 627.311(5)(b), F.S., provides that the minutes, audits, and procedures of the JUA board are subject to ch. 119, F.S. In recent years, representatives of the JUA have contended that the JUA is not statutorily subject to the "Government-in-the-Sunshine" provisions; however, the JUA "has agreed to conduct its meetings in the spirit of those requirements pursuant to regulatory requests."²⁵ Recently, the Office of Insurance Regulation directed the JUA to amend its plan

²¹ Section 119.15(4) (b), F.S.

²² Section 627.311(5), F.S.

²³ Section 119.011(2), F.S.

²⁴ AGO 94-32 and AGO 95-32.

²⁵ Florida Workers' Compensation Joint Underwriting Association, Inc. Minutes of the Board of Governors Meeting, June 22, 2005.

of operation to provide for meetings noticed in accordance with the Sunshine Laws and to comply promptly with all public record requests unless the information is exempt from the public record laws.²⁶

Citizens Property Insurance Corporation, the Florida Automobile Joint Underwriting Association, and the Florida Medical Malpractice Joint Underwriting Association, which operate as residual markets, have public record exemptions created in law. These exemptions include portions of meetings and claims and underwriting records related to ongoing litigation. This type of exemption assists residual markets during the litigation of a claim, since the release of such information could jeopardize or compromise ongoing or pending litigation. Presently, the JUA does not have a statutory exemption from the Public Records Act.

Effect of Proposed Changes

This bill creates s. 627.3121, F.S., to make the following records and portions of meetings held by the Florida Workers' Compensation Joint Underwriting Association confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution:

- Underwriting files, except that a policyholder or an applicant shall have access to his or her own underwriting files;
- Claims files of the JUA until the termination of all litigation and settlement of all claims arising out of the accident;
- Medical records related to the medical condition or medical status of an individual;
- Records obtained or generated by an internal auditor until the audit is completed, or if the audit is part of an investigation, until the investigation is closed or ceases to be active;
- Proprietary information licensed to the JUA under contract when the contract requires the association to maintain the confidentiality;
- Records relative to the participation of an employee in an employee assistance program;
- Information relating to negotiations for financing, reinsurance, depopulation, or contractual services, until the conclusion of the negotiations;
- Reports regarding suspected fraud or other criminal activity and producer appeals and related reporting regarding suspected misconduct until the investigation is closed or ceases to be active;
- Information received from the Department of Revenue regarding payroll information and client lists of employee leasing companies authorized under ss. 440.381 and 468.529, F.S.;
- A public record prepared by an attorney retained by the JUA to protect or represent the interests of the JUA or prepared at the attorney's express direction, that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the JUA.
- A transcript or minutes of exempt portions of meetings of the board of directors or any subcommittee of the board at which confidential and exempt records are discussed until termination of all litigation and settlement of all claims with regard to that claim.

The bill authorizes the release of underwriting files and claims files to a carrier who is considering underwriting a risk insured by the JUA, a producer seeking to place such a risk with such a carrier, or another entity seeking to arrange voluntary market coverage for the JUA risks, provided such person agrees to maintain the confidentiality of such files. The bill also allows the release of such records to another agency in the performance of that agency's official duties and responsibilities.

The exemption is subject to the Open Government Sunset Review Act and will expire October 2, 2012, unless the Legislature reviews the exemption and saves it from repeal.

This bill provides legislative findings that are necessary to make such records and related meetings of the board of directors or any subcommittee of the board confidential and exempt to prevent the disclosure of detailed information concerning a claim, including medical records and personal and sensitive information related to the medical condition of an individual and other records delineated in Section 1 of the bill.

²⁶ Letter from Kevin M. McCarty, Commission of the OIR to Laura Torrence, Executive Director of the JUA, October 12, 2005.

C. SECTION DIRECTORY:

Section 1: Creates s. 627.3121, relating to public records and public meetings exemptions for specified records held by the Florida Workers' Compensation Joint Underwriting Association.

Section 2: Provides a statement of public necessity.

Section 3: Provides an effective date of July 1, 2007.

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 because this bill does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

Vote Requirement

Article I, s. 24(c) of the Florida Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public records or public meetings exemption. The bill creates a public records exemption. Thus, it requires a two-thirds vote for passage.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution, requires a statement of public necessity (public necessity statement) for a newly created public records or public meetings exemption. The bill creates a public records exemption. Thus, it includes a public necessity statement.

B. RULE-MAKING AUTHORITY:

None provided in the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Committee on Insurance staff recommends the public necessity statement in section two of the bill be amended to include language regarding the necessity of the attorney-client record exemption.

Attorney-client communications - The Public Records Act applies to communications between attorneys and agencies. Only the Legislature can exempt attorney-client communications from the act.²⁷ Although s. 90.502, F.S., of the Evidence Code establishes an attorney-client privilege for public and private entities, this evidentiary statute does not remove communications between an agency and its attorney from the open inspection requirements of ch. 119, F.S. Further, it has been held that public disclosure of these documents does not violate the public agency's constitutional rights of due process, effective assistance of counsel, freedom of speech, or the jurisdiction of the Supreme Court over the bar. In the absence of an exemption, a work product exemption has been held to be "non-existent."²⁸

The Legislature has, however, created an attorney work product exemption. Section 119.071(1)(d)1., F.S., provides:

A public record that was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, *that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and that was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or that was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings*, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until the conclusion of the litigation or adversarial administrative proceedings [*emphasis added*]. . .

Not all trial preparation materials are public records. Attorney notes from attorneys to themselves are designed for their own personal use in remembering certain things and are preliminary guides intended to aid the attorney when they later formalize knowledge. As such, attorney notes have been held not to meet the definition of public records.²⁹ Similarly, the Florida Supreme Court has held that outlines, time lines, page notations regarding information in the record, and other similar items in the case file do not fall with the definition of public record (i.e., they do not communicate, perpetuate, or formalize knowledge) and are not subject to disclosure.³⁰ Interoffice and intraoffice memoranda may constitute public records even though encompassing trial preparation materials.³¹

The Florida Workers' Compensation Joint Underwriting Association, Inc., is an agency for purposes of the Public Records Act. As such, the exemption in s. 119.071(1)(d)1., F.S., would apply. The Legislature has also created an exemption in s. 286.011(8), F.S., for meetings between boards and attorneys. The bill provides the association with greater protection than the standard provided for agencies in s. 119.071(1)(d), F.S.

D. STATEMENT OF THE SPONSOR

None required as bill is a proposed council bill.

²⁷ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

²⁸ *Edelstein v. Donner*, 450 So.2d 562 (Fla. 3d DCA 1984), *approved* 471 So.2d 26 (Fla. 1985).

²⁹ *State v. Kokal*, 562 So.2d 324, 327 (Fla. 1990).

³⁰ *Johnson v. Butterworth*, 713 So.2d 985, 987 (Fla. 1998).

³¹ *Coleman v. Austin*, 521 So.2d 247, 248 (Fla. 1st DCA 1988).

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On April 12, 2007, the Jobs and Entrepreneurship Council considered the bill, adopted one amendment, and reported the bill favorably. The amendment added the following records held by the JUA is confidential and exempt:

- A public record prepared by an attorney retained by the JUA to protect or represent the interests of the JUA or prepared at the attorney's express direction, that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the JUA.

The amendment provides exempt nature of this type of record is not waived if the JUA releases it to another employee or officer of the JUA or any person consulted by the JUA attorney.

The staff analysis was updated to reflect the adoption of the amendment.