**The Florida Senate**

# *COMMITTEE MEETING EXPANDED AGENDA*

**RULES**
**Senator Thrasher, Chair**
**Senator Alexander, Vice Chair**

**MEETING DATE:** Tuesday, April 5, 2011
**TIME:** 8:00 —10:00 a.m.
**PLACE:** *Toni Jennings Committee Room,* 110 Senate Office Building

**MEMBERS:** Senator Thrasher, Chair; Senator Alexander, Vice Chair; Senators Bullard, Flores, Gaetz, Gardiner, Jones, Margolis, Negron, Richter, Siplin, Smith, and Wise

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 1 | **CS/CS/SB 408**<br>Budget Subcommittee on General Government Appropriations / Banking and Insurance / Richter<br>(Similar H 803, Compare CS/H 707, H 4115, H 7181, CS/S 858, S 1462) | Property and Casualty Insurance; Revises the definition of "losses," relating to the Florida Hurricane Catastrophe Fund, to exclude certain losses. Revises the amount of surplus funds required for domestic insurers applying for a certificate of authority after a certain date. Authorizes the Office of Insurance Regulation to reduce the surplus requirement under specified circumstances. Authorizes the office to disapprove a rate filing because the coverage is inadequate or the insurer charges a higher premium due to certain discriminatory factors, etc.<br><br>BI 01/25/2011<br>BI 02/07/2011 Temporarily Postponed<br>BI 02/22/2011 Fav/CS<br>BGA 03/11/2011 Fav/CS<br>BC 03/15/2011<br>BC 03/22/2011 Fav/2 Amendments<br>RC 04/05/2011 | |
| 2 | **CS/SB 378**<br>Rules Subcommittee on Ethics and Elections / Gaetz<br>(Identical CS/H 227) | Federal Write-in Absentee Ballot; Authorizes absent uniformed services voters and overseas voters to use the federal write-in absentee ballot to vote in any federal and certain state or local elections, under certain circumstances. Prescribes requirements for designating candidate choices. Provides for the disposition of valid votes involving joint candidacies. Allows for abbreviations, misspellings, and other minor variations in the name of an office, candidate, or political party. Authorizes the submission of multiple ballots under certain circumstances, etc.<br><br>EE 03/07/2011 Fav/CS<br>RC 04/05/2011<br>BC | |

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 3 | **CS/SB 426**<br>Judiciary / Latvala<br>(Compare H 291) | Service of Process; Authorizes certified process servers to serve writs of possession in actions for possession of residential property. Authorizes a landlord to select a certified process server to serve a writ of possession. Requires a certified process server to provide notice of the posting of the writ to the sheriff.<br><br>JU 02/08/2011 Fav/CS<br>CA 03/21/2011 Not Considered<br>CA 03/28/2011 Favorable<br>RC 04/05/2011 | |
| 4 | **SB 420**<br>Health Regulation<br>(Similar H 7079) | OGSR/Florida Center for Brain Tumor Research; Provides that personal identifying information pertaining to a donor to the central repository for brain tumor biopsies or the brain tumor registry of the Florida Center for Brain Tumor Research is confidential and exempt from public records requirements. Provides an exception under certain conditions for information disclosed to a person engaged in bona fide research. Provides for future legislative review and repeal of the exemption under the Open Government Sunset Review Act, etc.<br><br>HR 02/08/2011 Favorable<br>GO 03/23/2011 Favorable<br>RC 04/05/2011 | |
| 5 | **SB 568**<br>Judiciary<br>(Identical H 7085) | OGSR/Court Records/Court Monitors/Guardianship; Amends provisions relating to public record exemptions for court records relating to court monitors in guardianship proceedings. Consolidates provisions. Provides that orders appointing nonemergency court monitors are exempt rather than confidential and exempt. Provides that only court orders finding no probable cause are confidential and exempt. Saves the exemptions from repeal under the Open Government Sunset Review Act. Removes the scheduled repeal of the exemption.<br><br>JU 02/22/2011 Favorable<br>GO 03/23/2011 Favorable<br>RC 04/05/2011 | |

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 6 | **SB 570**<br>Judiciary<br>(Identical H 7083) | OGSR/Interference With Custody; Amends a provision relating to a public records exemption for information submitted to a sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. Saves the exemption from repeal under the Open Government Sunset Review Act. Deletes a provision providing for the repeal of the exemption.<br><br>JU 02/22/2011 Favorable<br>GO 03/23/2011 Favorable<br>RC 04/05/2011 | |
| 7 | **CS/SB 572**<br>Governmental Oversight and Accountability / Judiciary<br>(Identical H 7081) | OGSR/Statewide Public Guardianship Office; Amends a provision which provides an exemption from public records requirements for information that identifies certain donors or prospective donors to the direct-support organization for the Statewide Public Guardianship Office. Removes superfluous and duplicative language. Repeals a provision which provides for repeal of the exemption.<br><br>JU 02/22/2011 Favorable<br>GO 03/23/2011 Fav/CS<br>RC 04/05/2011 | |
| 8 | **CS/SB 600**<br>Governmental Oversight and Accountability / Criminal Justice<br>(Identical H 7075) | OGSR/Records/DJJ Employees & Family Members; Amends a provision which provides an exemption from public records requirements for identification and location information of certain current and former employees of the Department of Juvenile Justice and their family members. Revises the job classifications specified in the exemption to reflect those classifications used by the department. Removes the scheduled repeal of the exemption.<br><br>CJ 03/09/2011 Favorable<br>GO 03/23/2011 Fav/CS<br>RC 04/05/2011 | |
| 9 | **SB 602**<br>Criminal Justice<br>(Identical H 7077) | OGSR/Biometric Identification Information; Amends a provision which provides an exemption from public records requirements for biometric identification information held by an agency. Saves the exemption from repeal under the Open Government Sunset Review Act. Removes the scheduled repeal of the exemption.<br><br>CJ 03/09/2011 Favorable<br>GO 03/23/2011 Favorable<br>RC 04/05/2011 | |

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|---|---|---|---|
| 10 | **SB 2056**<br>Rules Subcommittee on Ethics and Elections<br>(Similar H 7159) | OGSR/Commission on Ethics; Amends provisions which provide exemptions from public records and public meeting requirements for records and meetings related to audits and investigations conducted by the Commission on Ethics of alleged violations of certain lobbyist registration and reporting requirements. Saves the exemptions from repeal under the Open Government Sunset Review Act. Removes the scheduled repeal of the exemptions.<br><br>EE 03/28/2011 Favorable<br>RC 04/05/2011<br>GO | |
| 11 | **CS/SB 670**<br>Judiciary / Joyner<br>(Similar CS/H 815) | Powers of Attorney; Provides for a durable power of attorney. Specifies the qualifications for an agent. Provides requirements for the execution of a power of attorney. Provides for the validity of powers of attorney created by a certain date or in another jurisdiction. Provides for the validity of a military power of attorney. Provides for the validity of a photocopy or electronic copy of a power of attorney. Provides for the meaning and effectiveness of a power of attorney, etc.<br><br>JU 03/14/2011 Fav/CS<br>BI 03/29/2011 Favorable<br>RC 04/05/2011 | |
| 12 | **SB 652**<br>Simmons<br>(Compare CS/H 703) | Liability of Spaceflight Entities; Saves a provision from future repeal which provides spaceflight entities with immunity from liability for the loss, damage, or death of a participant resulting from the inherent risks of spaceflight activities.<br><br>MS 03/10/2011 Favorable<br>JU 03/22/2011 Favorable<br>RC 04/05/2011 | |

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Alexander) recommended the following:

**Senate Amendment (with title amendment)**

Between lines 253 and 254
insert:

Section 3. Subsection (12) is added to section 215.5595, Florida Statutes, to read:

215.5595 Insurance Capital Build-Up Incentive Program.—

(12) The insurer may request that the board renegotiate the terms of any surplus note issued under this section before January 1, 2011. The request must be submitted to the board by January 1, 2012. If the insurer agrees to accelerate the payment period of the note by at least 5 years, the board must agree to exempt the insurer from the premium-to-surplus ratios required

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under paragraph (2)(d). If the insurer agrees to an acceleration of the payment period for less than 5 years, the board may, after consultation with the Office of Insurance Regulation, agree to an appropriate revision of the premium-to-surplus ratios required under paragraph (2)(d) for the remaining term of the note if the revised ratios are not lower than a minimum writing ratio of net premium to surplus of at least 1 to 1 and, alternatively, a minimum writing ratio of gross premium to surplus of at least 3 to 1.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 6

and insert:

applicability; amending s. 215.5595, F.S.; authorizing an insurer to renegotiate the terms a surplus note issued before a certain date; providing limitations; amending s. 624.407, F.S.; revising the

LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Smith) recommended the following:

**Senate Substitute for Amendment (749848) (with title amendment)**

Delete lines 747 - 753

and insert:

3. For all property insurance filings made or submitted after January 25, 2007, but before December 31, 2011 ~~2010~~, an insurer seeking a rate that is greater than the rate most recently approved by the office shall make a "file and use" filing. For purposes of this subparagraph, motor vehicle collision and comprehensive coverages are not considered ~~to be~~ property coverages.


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15 ================ T I T L E  A M E N D M E N T ================
16 And the title is amended as follows:
17 Delete lines 77 - 78
18 and insert:
19 discriminatory factors; extending the expiration date
20 for making a “file and use” filing; prohibiting the
21 Office of Insurance

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Smith) recommended the following:

**Senate Amendment (with title amendment)**

Delete line 1249

and insert:

(d) The certification made pursuant to paragraph (a) is not rendered false if, after making the subject rate filing, the insurer provides the office with additional or supplementary information pursuant to a formal or informal request from the office. However, the actuary who is primarily responsible for preparing and submitting such information must certify the information in accordance with the certification required under paragraph (a) and the penalties in paragraph (b), except that the chief executive officer, chief financial officer, or chief

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actuary need not certify the additional or supplementary information.

(e) ~~(d)~~ The commission may adopt rules and forms ~~pursuant to~~

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 92

and insert:

Legislature; providing for the submission of additional or supplementary information pursuant to a rate filing; amending s. 627.0629, F.S.; providing

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Smith) recommended the following:

**Senate Amendment (with title amendment)**

Delete lines 1266 - 1310

and insert:

(1) ~~(a)~~ It is the intent of the Legislature that insurers ~~must~~ provide savings to consumers who install or implement windstorm damage mitigation techniques, alterations, or solutions to their properties to prevent windstorm losses. A rate filing for residential property insurance must include actuarially reasonable discounts, credits, or other rate differentials, or appropriate reductions in deductibles, for properties on which fixtures or construction techniques demonstrated to reduce the amount of loss in a windstorm have

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been installed or implemented. The fixtures or construction techniques must ~~shall~~ include, but are not ~~be~~ limited to, fixtures or construction techniques that ~~which~~ enhance roof strength, roof covering performance, roof-to-wall strength, wall-to-floor-to-foundation strength, opening protection, and window, door, and skylight strength. Credits, discounts, or other rate differentials, or appropriate reductions in deductibles, for fixtures and construction techniques that ~~which~~ meet the minimum requirements of the Florida Building Code must be included in the rate filing. All insurance companies must make a rate filing that ~~which~~ includes the credits, discounts, or other rate differentials or reductions in deductibles by February 28, 2003. By July 1, 2007, the office shall reevaluate the discounts, credits, other rate differentials, and appropriate reductions in deductibles for fixtures and construction techniques that meet the minimum requirements of the Florida Building Code, based upon actual experience or any other loss relativity studies available to the office. The office shall determine the discounts, credits, other rate differentials, and appropriate reductions in deductibles that reflect the full actuarial value of such revaluation, which may be used by insurers in rate filings.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete lines 92 - 101

and insert:

Legislature; amending s. 627.029, F.S.; deleting obsolete

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Smith) recommended the following:

**Senate Amendment (with directory and title amendments)**

Between lines 1366 and 1367
insert:

(a)~~1.~~ ~~It is~~ The public purpose of this subsection is to ensure that there is ~~the existence of~~ an orderly market for property insurance for residents ~~Floridians~~ and ~~Florida~~ businesses of this state.

1. The Legislature finds that private insurers are unwilling or unable to provide affordable property insurance coverage in this state to the extent sought and needed. The absence of affordable property insurance threatens the public health, safety, and welfare and likewise threatens the economic

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health of the state. The state therefore has a compelling public interest and a public purpose to assist in assuring that property in the state is insured and that it is insured at affordable rates so as to facilitate the remediation, reconstruction, and replacement of damaged or destroyed property in order to reduce or avoid the negative effects otherwise resulting to the public health, safety, and welfare, to the economy of the state, and to the revenues of the state and local governments which are needed to provide for the public welfare. It is necessary, therefore, to provide affordable property insurance to applicants who are in good faith entitled to procure insurance through the voluntary market but are unable to do so. The Legislature intends, therefore, ~~by this subsection~~ that affordable property insurance be provided and that it continue to be provided, as long as necessary, through Citizens Property Insurance Corporation, a government entity that is an integral part of the state, and that is not a private insurance company. To that end, Citizens Property Insurance Corporation shall strive to increase the availability of affordable property insurance in this state, while achieving efficiencies and economies, and while providing service to policyholders, applicants, and agents which is no less than the quality generally provided in the voluntary market, for the achievement of the foregoing public purposes. Because it is essential for this government entity to have the maximum financial resources to pay claims following a catastrophic hurricane, it is the intent of the Legislature that Citizens Property Insurance Corporation continue to be an integral part of the state and that the income of the corporation be exempt from federal income

taxation and that interest on the debt obligations issued by the corporation be exempt from federal income taxation.

2. The Residential Property and Casualty Joint Underwriting Association originally created by this statute shall be known~~,~~ ~~as of July 1, 2002,~~ as the Citizens Property Insurance Corporation. The corporation shall provide insurance for residential and commercial property, for applicants who are ~~in good faith~~ entitled, but, in good faith, are unable~~,~~ to procure insurance through the voluntary market. The corporation shall operate pursuant to a plan of operation approved by order of the Financial Services Commission. The plan is subject to continuous review by the commission. The commission may, by order, withdraw approval of all or part of a plan if the commission determines that conditions have changed since approval was granted and that the purposes of the plan require changes in the plan. ~~The corporation shall continue to operate pursuant to the plan of operation approved by the Office of Insurance Regulation until October 1, 2006.~~ For the purposes of this subsection, residential coverage includes both personal lines residential coverage, which consists of the type of coverage provided by homeowner's, mobile home owner's, dwelling, tenant's, condominium unit owner's, and similar policies;~~,~~ and commercial lines residential coverage, which consists of the type of coverage provided by condominium association, apartment building, and similar policies.

3. Effective January 1, 2009, a personal lines residential structure that has a dwelling replacement cost of $2 million or more, or a single condominium unit that has a combined dwelling and contents ~~content~~ replacement cost of $2 million or more is


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not eligible for coverage by the corporation. Such dwellings insured by the corporation on December 31, 2008, may continue to be covered by the corporation until the end of the policy term. However, such dwellings ~~that are insured by the corporation and become ineligible for coverage due to the provisions of this subparagraph~~ may reapply and obtain coverage if the property owner provides the corporation with a sworn affidavit from one or more insurance agents, on a form provided by the corporation, stating that the agents have made their best efforts to obtain coverage and that the property has been rejected for coverage by at least one authorized insurer and at least three surplus lines insurers. If such conditions are met, the dwelling may be insured by the corporation for up to 3 years, after which time the dwelling is ineligible for coverage. The office shall approve the method used by the corporation for valuing the dwelling replacement cost for the purposes of this subparagraph. If a policyholder is insured by the corporation prior to being determined to be ineligible pursuant to this subparagraph and such policyholder files a lawsuit challenging the determination, the policyholder may remain insured by the corporation until the conclusion of the litigation.

4. It is the intent of the Legislature that policyholders, applicants, and agents of the corporation receive service and treatment of the highest possible level but never less than that generally provided in the voluntary market. It <u>is</u> also ~~is~~ intended that the corporation be held to service standards no less than those applied to insurers in the voluntary market by the office with respect to responsiveness, timeliness, customer courtesy, and overall dealings with policyholders, applicants,


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or agents of the corporation.

5. Effective January 1, 2009, a personal lines residential structure that is located in the "wind-borne debris region," as defined in s. 1609.2, International Building Code (2006), and that has an insured value on the structure of $750,000 or more is not eligible for coverage by the corporation unless the structure has opening protections as required under the Florida Building Code for a newly constructed residential structure in that area. A residential structure shall be deemed to comply with ~~the requirements of~~ this subparagraph if it has shutters or opening protections on all openings and if such opening protections complied with the Florida Building Code at the time they were installed.

6. In recognition of the corporation's status as a governmental entity, policies issued by the corporation must include a provision stating that as a condition of coverage with the corporation, policyholders may not engage the services of a public adjuster to represent the policyholder with respect to any claim filed under a policy issued by the corporation until after the corporation has tendered an offer with respect to such claim. For any claim filed under any policy of the corporation, a public adjuster may not request payment or be paid, on a contingency basis or based in any way, directly or indirectly, on a percentage of the claim amount, and may be paid only a reasonable hourly fee based on the actual hours of work performed, subject to a maximum of 5 percent of the additional amount actually paid over the amount that was originally offered by the corporation for any one claim.


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====== D I R E C T O R Y  C L A U S E  A M E N D M E N T ======
And the directory clause is amended as follows:
Delete line 1362
and insert:
Section 15. Paragraphs (a), (b), (c), (d), (v), and (y) of

================ T I T L E  A M E N D M E N T ================
And the title is amended as follows:
Delete line 112
and insert:
by the act; amending s. 627.351, F.S.; requiring policies issued by the corporation to include a provision that prohibits policyholders from engaging the services of a public adjuster until after the corporation has tendered an offer; limiting an adjuster’s fee for a claim against the corporation; renaming the

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Smith) recommended the following:

**Senate Amendment (with title amendment)**

Between lines 2129 and 2130
insert:

19. Must offer sinkhole coverage. However, effective February 1, 2012, coverage is not included for losses to appurtenant structures, driveways, sidewalks, decks, or patios that are directly or indirectly caused by sinkhole activity. The corporation shall exclude such coverage using a notice of coverage change, which may be included with the policy renewal, and not by issuance of a notice of nonrenewal of the excluded coverage upon renewal of the current policy.

20. As a condition for making payment for damage caused by

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the peril of sinkhole, regardless of whether such payment is made pursuant to the contract, mediation, neutral evaluation, appraisal, arbitration, settlement, or litigation, the payment must be dedicated entirely to the costs of repairing the structure or remediation of the land. Unless this condition is met, the corporation is prohibited from making payment.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 119

and insert:

ordinance; limiting coverage for damage from sinkholes after a certain date and providing that the corporation must require repair of the property as a condition of any payment; prohibiting board members from voting on

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Smith) recommended the following:

**Senate Amendment (with directory and title amendments)**

Between lines 2192 and 2193

insert:

(n)1. Rates for coverage provided by the corporation must ~~shall~~ be actuarially sound and subject to ~~the requirements of~~ s. 627.062, except as otherwise provided in this paragraph. The corporation shall file its recommended rates with the office at least annually. The corporation shall provide any additional information regarding the rates which the office requires. The office shall consider the recommendations of the board and issue a final order establishing the rates for the corporation within 45 days after the recommended rates are filed. The corporation

may not pursue an administrative challenge or judicial review of the final order of the office.

2. In addition to the rates otherwise determined pursuant to this paragraph, the corporation shall impose and collect an amount equal to the premium tax provided ~~for~~ in s. 624.509 to augment the financial resources of the corporation.

3. After the public hurricane loss-projection model under s. 627.06281 has been found to be accurate and reliable by the Florida Commission on Hurricane Loss Projection Methodology, the ~~that~~ model shall serve as the minimum benchmark for determining the windstorm portion of the corporation's rates. This subparagraph does not require or allow the corporation to adopt rates lower than the rates otherwise required or allowed by this paragraph.

4. The rate filings for the corporation which were approved by the office and ~~which~~ took effect January 1, 2007, are rescinded, except for those rates that were lowered. As soon as possible, the corporation shall begin using the lower rates that were in effect on December 31, 2006, and ~~shall~~ provide refunds to policyholders who ~~have~~ paid higher rates as a result of that rate filing. The rates in effect on December 31, 2006, ~~shall~~ remain in effect for the 2007 and 2008 calendar years except for any rate change that results in a lower rate. The next rate change that may increase rates shall take effect pursuant to a new rate filing recommended by the corporation and established by the office, subject to ~~the requirements of~~ this paragraph.

5. Beginning on July 15, 2009, and annually ~~each year~~ thereafter, the corporation must make a recommended actuarially sound rate filing for each personal and commercial line of

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business it writes, to be effective no earlier than January 1, 2010.

6. Beginning on or after January 1, 2010, and notwithstanding the board's recommended rates and the office's final order regarding the corporation's filed rates under subparagraph 1., the corporation shall annually implement a rate increase ~~each year~~ which, except for sinkhole coverage, does not exceed 10 percent for any single policy issued by the corporation, excluding coverage changes and surcharges.

7. The corporation may also implement an increase to reflect the effect on the corporation of the cash buildup factor pursuant to s. 215.555(5)(b).

8. The corporation's implementation of rates as prescribed in subparagraph 6. shall cease for any line of business written by the corporation upon the corporation's implementation of actuarially sound rates. Thereafter, the corporation shall annually make a recommended actuarially sound rate filing for each commercial and personal line of business the corporation writes.

====== D I R E C T O R Y C L A U S E A M E N D M E N T ======

And the directory clause is amended as follows:

Delete line 1362

and insert:

Section 15. Paragraphs (b), (c), (d), (n), (v), and (y) of

================ T I T L E A M E N D M E N T ================

And the title is amended as follows:

Delete line 120

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and insert:

certain measures; exempting sinkhole coverage from the corporation's annual rate increase requirements; deleting a requirement that the

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Richter) recommended the following:

**Senate Amendment (with directory and title amendments)**

Between lines 2192 and 2193
insert:

(s)1. There is ~~shall be~~ no liability on the part of, and no cause of action ~~of any nature~~ shall arise against, any assessable insurer or its agents or employees, the corporation or its agents or employees, members of the board of governors or their respective designees at a board meeting, corporation committee members, or the office or its representatives, for any action taken by them in the performance of their duties or responsibilities under this subsection.

a. As part of the immunity, the corporation, as a

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governmental entity serving a public purpose, is not liable for any claim for bad faith whether or not brought pursuant to s. 624.155, and this subsection or any other provision of law does not create liability or a cause of action for bad faith or a claim for extracontractual damages.

b. Such immunity does not apply to:

(I) ~~a.~~ Any of the foregoing persons or entities for any willful tort;

(II) ~~b.~~ The corporation or its producing agents for breach of any contract or agreement pertaining to insurance coverage;

(III) ~~c.~~ The corporation with respect to issuance or payment of debt;

(IV) ~~d.~~ An ~~Any~~ assessable insurer with respect to any action to enforce an assessable insurer's obligations to the corporation under this subsection; or

(V) ~~e.~~ The corporation in any pending or future action for breach of contract or for benefits under a policy issued by the corporation.~~;~~ In any such action, the corporation is not ~~shall be~~ liable to the policyholders and beneficiaries for attorney's fees under s. 627.428.

2. The corporation shall manage its claim employees, independent adjusters, and others who handle claims to ensure they carry out the corporation's duty to its policyholders to handle claims carefully, timely, diligently, and in good faith, balanced against the corporation's duty to the state to manage its assets responsibly in order to minimize its assessment potential.

====== D I R E C T O R Y C L A U S E A M E N D M E N T ======

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And the directory clause is amended as follows:

Delete line 1362

and insert:

Section 15. Paragraphs (b), (c), (d), (s), (v), and (y) of

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 120

and insert:

certain measures; clarifying that the corporation is immune from certain liabilities; deleting a requirement that the

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Smith) recommended the following:

**Senate Amendment**

Delete lines 2705 - 2706
and insert:
(1) Every insurer authorized to transact property insurance in this state

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Smith) recommended the following:

**Senate Substitute for Amendment (901222) (with title amendment)**

Delete lines 2583 - 2596

and insert:

(b) For personal property:

1. The insurer must offer coverage under which the insurer is obligated to pay the replacement cost without reservation or holdback for any depreciation in value, whether or not the insured replaces the property.

2. The insurer may also offer coverage under which the insurer may limit the initial payment to the actual cash value of the personal property to be replaced, require the insured to

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provide receipts for the purchase of the property financed by the initial payment, use such receipts to make the next payment requested by the insured for the replacement of insured property, and continue this process until the insured remits all receipts up to the policy limits for replacement costs. The insurer must provide clear notice of this process in the insurance contract. The insurer may not require the policyholder to advance payment for the replaced property~~, the insurer shall pay the replacement cost without reservation or holdback of any depreciation in value, whether or not the insured replaces or repairs the dwelling or property~~.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 154

and insert:

repairs and expenses; requiring the insurer to offer coverage under which the insurer is obligated to pay replacement costs; authorizing the insurer to offer coverage that limits

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Smith) recommended the following:

**Senate Amendment (with title amendment)**

Between lines 3076 and 3077
insert:

(3) Upon completion of any building stabilization or foundation repairs for a verified sinkhole loss, the professional engineer responsible for monitoring the repairs shall issue a report to the property owner which specifies what repairs have been performed and certifies within a reasonable degree of professional probability that such repairs have been properly performed. The professional engineer issuing the report shall file a copy of the report and certification, which includes a legal description of the real property and the name

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of the property owner, with the county clerk of the court, who shall record the report and certification. This subsection does not create liability for an insurer based on any representation or certification by a professional engineer related to the stabilization or foundation repairs for the verified sinkhole loss.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 197

and insert:

to accepting payment; requiring the professional engineer responsible for monitoring sinkhole repairs to issue a report and certification to the property owner and file such report with the court; providing that the act does not create liability for an insurer based on a representation or certification by the engineer; amending s. 627.7074, F.S.;

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LEGISLATIVE ACTION

Senate . House

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The Committee on Rules (Alexander) recommended the following:

**Senate Amendment (with title amendment)**

Between lines 3296 and 3297
insert:

Section 28. Subsection (8) of section 627.711, Florida Statutes, is amended to read:

627.711 Notice of premium discounts for hurricane loss mitigation; uniform mitigation verification inspection form.—

(8) ~~At its expense,~~ The insurer may require that a ~~any~~ uniform mitigation verification form provided by a policyholder, a policyholder's agency, or an authorized mitigation inspector or inspection company be independently verified by an inspector, an inspection company, or an independent third-party quality

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assurance provider which possesses ~~does possess~~ a quality assurance program before ~~prior to~~ accepting the uniform mitigation verification form as valid.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete line 214

and insert:

requiring the department to adopt rules; amending s. 627.711, F.S.; deleting the requirement that the insurer pay for verification of a uniform mitigation verification form that the insurer requires; amending s.

**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.)

Prepared By: The Professional Staff of the Rules Committee

| | |
|---|---|
| BILL: | CS/CS/SB 408 |
| INTRODUCER: | Budget Subcommitee on General Government Appropriations, Banking and Insurance Committee, and Senator Richter |
| SUBJECT: | Property Insurance |
| DATE: | April 1, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Knudson, Emrich | Burgess | BI | **Fav/CS** |
| 2. | Frederick | DeLoach | BGA | **Fav/CS** |
| 3. | Frederick | Meyer, C. | BC | **Fav/2 amendments** |
| 4. | Frederick | Phelps | RC | **Pre-meeting** |
| 5. | | | | |
| 6. | | | | |

## Please see Section VIII. for Additional Information:

| | | |
|---|---|---|
| A. COMMITTEE SUBSTITUTE..... | X | Statement of Substantial Changes |
| B. AMENDMENTS..... | | Technical amendments were recommended |
| | X | Amendments were recommended |
| | | Significant amendments were recommended |

## I. Summary:

This bill makes numerous changes to laws related to property insurance, primarily residential property insurance. The bill addresses the following primary issues:

- Requires the Florida Hurricane Catastrophe Fund to provide reimbursement for "all incurred losses" including amounts paid as fees on behalf of the policyholder, with exclusions;
- Increases the minimum surplus requirements for residential property insurers to $15 million;
- Allows insurers offering personal lines property insurance to provide written notice of policy changes to their policyholders without having to non-renew an entire insurance policy due to a change in policy terms;
- Reduces the insurer's written notice of nonrenewal, cancellation, or termination of a personal lines or commercial residential property insurance policy to 90 days;
- Modifies current replacement cost coverage and actual cash value provisions relating to dwellings and personal property;
- Requires windstorm and hurricane property insurance claims to be brought within three years and sinkhole loss claims to be brought within two years;

- Modifies provisions related to windstorm damage mitigation discounts for residential property insurance and repeals the provision requiring the OIR to develop a method correlating mitigation discounts to the uniform home grading scale;
- Repeals the requirement that the Consumer Advocate prepare an annual report card for personal residential property insurers;
- Renames the Citizens High Risk Account the Coastal Account and repeals the requirement to reduce the boundaries of the Citizens' High Risk Account (wind-only coverages);
- Allows an insurer seeking to take policies out of Citizens to do so in 45 days;
- Clarifies the ethics requirements for specified board members of the Citizens Property Insurance Corp., and provides that Board members abstain from voting under certain circumstances;
- Allows an insurer to cancel or nonrenew a property insurance policy upon a minimum of 45 days' notice based on a finding that the insurer lacks adequate reinsurance coverage for hurricane risk and other financial factors;
- Revises the regulation of public adjusters by placing limits on public adjuster compensation, prohibiting certain statements in public adjuster advertising, and revising the contents of the public adjuster contract;
- Removes the requirement that a property insurer must offer sinkhole coverage and eliminates application of statutes governing catastrophic ground cover collapse and sinkhole loss coverage from commercial property insurance policies;
- Revises what constitutes a sinkhole loss;
- Limits the authority of the Office of Insurance Regulation (OIR) to disapprove rates for sinkhole insurance.
- Revises procedures for insurers and policyholders relating to standards for sinkhole insurance claim investigations and revises the neutral evaluation process for sinkhole disputes; and
- Provides changes to the procedures pertaining to sinkhole reports by professional engineers or professional geologists and repeals the sinkhole database.

This bill substantially amends the following sections of the Florida Statutes: 215.555, 624.407, 624.408, 624.4095, 624.424, 626.854, 626.8651, 626.8796, 627.0613, 627.062, 627.0629, 627.351, 627.3511, 627.4133, 627.7011, 627.70131, 627.706, 627.7061, 627.707, 627.7073, 627.7074, 627.712

This bill creates sections 626.70132 and 627.73141, Florida Statutes.

This bill repeals section 627.7065, Florida Statutes.

## II. Present Situation:

### Insurer Surplus Requirements

Florida law specifies certain minimum surplus and capital requirements for property and casualty insurers to transact insurance in the state. Under s. 624.407, F.S., the minimum surplus requirement for new property and casualty insurers in Florida, which includes residential property writers, is the greater of $5 million or ten percent of the insurer's liabilities. The minimum surplus requirement for a residential property insurer, once it is licensed in Florida, is the greater of $4 million or ten percent of the insurer's liabilities.

The current surplus and capital requirements for property and casualty insurers have not been changed since 1993.[1] Surplus is the reserves an insurer has available to pay claims and is a critical component in measuring the financial strength of a company.[2] It is the financial cushion that protects insurers in case of an unexpectedly high number of claims. According to OIR officials, in the past 17 years, circumstances have changed and costs have increased, particularly for residential property insurers, such that increased minimum surplus requirements are necessary. For example, in 2009, the rating agency A.M. Best downgraded nine insurers that sell homeowners insurance in Florida, and Demotech, a company that rates some of the smaller domestic Florida insurers, withdrew its rating from six insurers.[3] Two such insurers were ordered into receivership.[4]

The OIR has found that the current level of surplus is not sufficient to support the business plans of residential property insurers in Florida and has cited several reasons for this position.

- Reinsurance costs continue to rise. The rates charged by reinsurers have increased and the amount of reinsurance being purchased by most insurance companies has also increased. Reinsurance costs vary from insurer to insurer, but currently average at least 30 percent of an insurer's written premium, and in many cases reach 50 percent. The prices reinsurers charge Florida companies change yearly, based on general worldwide losses and capital costs, as well as Florida losses. Reinsurance rates are not regulated by the OIR.
- Changes to the Florida Hurricane Catastrophe Fund (FHCF) have resulted in increases in reinsurance costs to residential property insurers in Florida; therefore insurers will need to purchase more reinsurance from the private market. Since 2007, such insurers have had the option of purchasing coverage from the FHCF above its mandatory layer. This coverage is referred to as TICL coverage. However, the amount of such coverage available for insurers to purchase decreases each year and is currently scheduled to be phased out over the next five years.[5] Reinsurance purchased by insurers from the FHCF is considerably less expensive than private market reinsurance. As TICL coverage is replaced with coverage from the private market, reinsurance costs to insurers will increase. Also, the cost of coverage in the FHCF's mandatory layer is increasing by five percent per year under the "cash build-up" factor. This provision is intended to ensure that the FHCF will have the funds necessary to pay losses when they arise.
- Non-catastrophe losses are increasing. Even in years with no hurricanes in Florida, property writers are experiencing increased losses. This may be attributable to some extent to the current economy. Also, fraudulent or inflated claims are being filed and are expected to increase in times of stressed economic conditions.

In addition to the total surplus amount required by statute, an insurer must also meet specific requirements for its ratios of gross written premium to surplus and net written premiums to

[1] Ch. 1993-410, L.O.F.
[2] An insurer's surplus is the remainder after a company's liabilities are subtracted from its assets.
[3] Windstorm Mitigation Discounts Report, February 1, 2010, Florida Commission on Hurricane Loss Projection Methodology.
[4] Coral Insurance Company and American Keystone Insurance Company are in receivership.
[5] The TICL or Temporary Increase in Coverage Limit Options.

surplus.[6] A company's calculated gross written premium is not allowed to exceed 10 times its surplus as to policyholders; the calculated net written premium may not exceed 4 times its surplus as to policyholders.[7] If a company's premiums exceed either of these ratios, the OIR shall either suspend the insurer's certificate or establish by order the insurer's gross or net written premiums, unless the insurer demonstrates to OIR's satisfaction that exceeding the statutory ratios does not endanger the financial condition of the insurer or the interests of the policyholders.

**Florida's Rating Law**

Section 627.062, F.S., specifies the rate filing process for property and casualty insurers and provides rating standards for these insurers. The rating law applies to property, casualty and surety insurance and prohibits rates that are excessive, inadequate, or unfairly discriminatory. The rating law specifies what constitutes an excessive, inadequate, or unfairly discriminatory rate as follows.

- A rate is excessive if:
  - It is likely to produce a profit from Florida business that is unreasonably high in relation to the risk involved or if expenses are unreasonably high in relation to the services rendered.
  - The rate structure established by a stock insurance company provides for replenishment of surpluses from premiums, when the replacement is attributable to investment losses.
- A rate is inadequate if:
  - It is clearly insufficient, together with the investment income attributable to them to sustain projected losses and expenses in the class of business to which it applies.
  - If discounts or credits are allowed that exceed a reasonable reflection of expense savings and reasonably expected loss experience from the risk or group or risks.
- A rate is unfairly discriminatory if:
  - The rating plan, including discounts, credits, or surcharges fails to clearly and equitably reflect consideration of the policyholder's participation in a risk management program pursuant to s. 627.0625, F.S.
  - As to a risk or group of risks, the application of premium discounts, credits, or surcharges among the risks does not bear a reasonable relationship to the expected loss and expense experience among the various risks.

Legislation enacted in 2009 allows insurers to make a separate expedited rate filing with the OIR for residential property insurance, which is exempt from the rate filing requirements otherwise applicable under s. 627.062, F.S.[8] The provision (s. 627.062(2)(k), F.S.) is limited to allowing adjustments to rates for reinsurance or financing costs related to the purchase of reinsurance or financing products to replace or finance the payment of the amount covered by the Florida Hurricane Catastrophe Fund's temporary increase in coverage limit (TICL) layer. This includes replacement reinsurance for the TICL reductions, as well as the cash build-up factor and the

[6] S. 624.4095, F.S.
[7] S. 624.4095, F.S., specifies that for property insurers, the calculated premium is the product of 0.90 times the actual or projected premium.
[8] Ch. 2009-87, L.O.F. The OIR has 45 days after the date of the filing to review it and determine if the rate is excessive, inadequate, or unfairly discriminatory.

increase in the price for the remaining TICL layers.[9] All costs contained in the filing are capped at ten percent per policyholder. However, financing products such as a liquidity instrument or line of credit cannot result in an overall premium increase exceeding three percent. The law also provides that insurers purchasing this reinsurance do so at a price no higher than would be paid in an arms-length transaction. An insurer may make only one filing under this provision in any 12-month period.

**Change of Policy Terms in Insurance Policies**

Under the 5th District Court of Appeal's holding in the case of *U.S. Fire Insurance Co. and Hartford Insurance Company of the Southeast v. Southern Security Life Insurance Co*., 710 So.2d 130 (Fla. 5th DCA 1998), when an insurance company changes a term or terms of a policy, the change constitutes a nonrenewal of the entire policy by the insurer and thus the insurer must send notice of the policy's nonrenewal to the policyholder in accordance with s. 627.4133, F.S. According to the court, providing the policyholder with a new policy that contains the changed policy term is not sufficient notice of the policy changes. The process of non-renewing an entire insurance policy due to a change in a policy term, and subsequently offering coverage to the policyholder, has caused confusion to policyholders.

**Replacement Cost Insurance Coverage**

There are two basic ways that property insurance losses can be adjusted: replacement cost value (RCV) or actual cash value (ACV). Actual cash value is the depreciated value of the property being replaced or repaired. Current law requires that companies issuing homeowners' insurance policies must offer policyholders an option for replacement cost coverage.[10] The law provides that if a loss is insured for replacement cost, the insurer must pay the replacement costs without holdback of any depreciation in value, whether or not the insured replaces or repairs the dwelling or property.

Until 2005, under a replacement cost policy an insurer could make an initial payment based on an ACV basis and require the insured to complete the repair before the insurer paid the balance of the full replacement cost. Following the multiple hurricanes of 2004 and 2005, regulators received complaints from policyholders who were given the ACV, but could not afford to fund the balance necessary to make the repairs or replacements. As a result, these policyholders had paid premiums for replacement cost coverage, but were only being paid ACV. In 2005, the Legislature addressed this problem by requiring that for any loss sustained by a policyholder who has purchased replacement cost coverage, the insurer must pay the full replacement cost, whether or not the insured replaces or repairs the damaged property. [11]

[9] The TICL or Temporary Increase in Coverage Limit Options allows residential property insurers to purchase additional reinsurance *above* the FHCF's mandatory coverage. The 2009 legislation also authorized the FHCF to implement a "cash build up" factor which would increase the reimbursement premiums that the Fund charges property insurers for the mandatory layer of coverage provided by the Fund. The cash build up factor is based on a five percent annual increase which will be phased in over a five-year period, at which time the increase will be 25 percent.
[10] S. 627.7011, F.S.
[11] Ch. 2005-111, L.O.F.

Insurance companies assert that the current replacement cost and holdback provisions allow some homeowners to file inflated or even fraudulent claims because they are not required to make needed repairs to their dwellings or replace their personal property if they sustain a loss. Many states require the insurer to pay initially only the actual cash value, and then provide the balance of the replacement cost once the insured has replaced or repaired the property.

**Mitigation Credits, Discounts, or Other Rate Differentials**

Section 627.0629, F.S., requires rate filings for residential property insurance to include actuarially reasonable discounts, credits, or other rate differentials, or appropriate reductions in deductibles to consumers who implement windstorm damage mitigation techniques to their properties. The windstorm mitigation measures that must be evaluated for purposes of mitigation discounts include fixtures or construction techniques that enhance roof strength; roof covering performance; roof-to-wall strength; wall-to-floor foundation strength; opening protections; and window, door, and skylight strength.

**Public Adjusters**

Public adjusters are defined as persons, other than licensed attorneys, who, for compensation, prepare or file an insurance claim form for an insured or third-party claimant in negotiating or settling an insurance claim on behalf of the insured or third party.[12] They are employed exclusively by a policyholder who has sustained an insured loss and their responsibilities include inspecting the loss site, analyzing damages, assembling claim support data, reviewing the insured's coverage, determining current replacement costs, and conferring with the insurer's representatives to adjust the claim.

Public adjusters are licensed by the Department of Financial Services (DFS) and must meet specified age, residency, examination, and surety bond requirements. As of September 2010, Florida had 2,511 licensed public adjusters. In 2008, the Legislature created a public adjuster apprentice license and mandated age, residency, examination, and bond requirements. The public adjuster apprentice must be under the supervision of a licensed public adjuster for a 12-month period in order to qualify for licensure as a property and casualty public adjuster.

Current law provides that a public adjuster may not charge a fee unless a written contract was executed prior to the payment of a claim. Such adjusters are prohibited from charging more than 20 percent of the insurance claims payment on non-hurricane claims and 10 percent of the insurance claims payment on hurricane claims for claims made during the first year after the declaration of the emergency. These fee caps apply only to residential property insurance policies and condominium association policies. There is no fee cap on re-opened or supplemental hurricane claims; however, the fee cannot be based on any payments made by the insurer to the insured prior to the time of the public adjuster contract.

Insureds or claimants have five business days after the date on which the contract is executed to cancel a public adjuster's contract during a state of emergency declared by the Governor. Insureds or claimants have 3 business days to cancel a contract as to claims involving non-

[12] S. 626.854, F.S. See, Part VI (Insurance Adjusters) under ch. 626, F.S.

emergencies. Public adjuster contracts must be in writing and must display an anti-fraud statement.

Current statutes prohibit a public adjuster from directly or indirectly contacting any insured or claimant until 48 hours after an event that triggered a claim. However, that provision was recently struck down by the First District Court of Appeal which ruled that the restriction on soliciting customers within 48 hours of a disaster or other insurance claims event violated commercial speech protected by the state Constitution.[13] The law was challenged in a law suit by Frederick Kortum, a public adjuster in Oviedo. Kortum made the argument that the first 48 hours are of vital importance because policyholders may make decisions that affect how much they could receive from an insurer.

**Citizens Property Insurance Corporation**

Citizens Property Insurance Corporation (Citizens) is a state-created, not-for-profit, tax-exempt governmental entity whose public purpose is to provide property insurance coverage to those unable to find coverage in the voluntary admitted market.[14] It is not a private insurance company.[15] Citizens is governed by an eight member board of Governors, two of whom are appointed by each of the following State leaders: Governor, Chief Financial Officer, Senate President, and Speaker of the House of Representatives. It operates pursuant to a plan of operation which is reviewed and approved by the Financial Services Commission and is subject to regulation by the Office of Insurance Regulation.

Citizens is currently the largest property insurer in Florida with almost 1.3 million policies extending approximately $457 billion of property insurance coverage to Floridians which represents approximately 18 percent of the residential exposure in the State covered by the admitted market.[16] Beginning January 1, 2010, Citizens must implement a rate increase each year which does not exceed 10 percent for any single policy issued by the corporation, excluding coverage changes and surcharges, until rates are actuarially sound.

Citizens was created by the Legislature in 2002 by the merger of two existing property insurance associations: The Florida Residential Property and Casualty Joint Underwriting Association (FRPCJUA) and the Florida Windstorm Underwriting Association (FWUA). The FRPCJUA provided full-coverage personal and commercial residential property policies in all counties of Florida while the FWUA provided personal and commercial residential property wind-only coverage in designated territories.

Citizens' book of business is divided into three separate accounts:[17]

- Personal Lines Account (PLA): Personal residential multi-peril policies including homeowners, mobile homes, dwelling fire, tenants, condominium unit owners.

[13] *Kortum v. Sink*, Case No. 1D10-2459, First District Court of Appeal. Opinion rendered on December 29, 2010.
[14] Admitted market means insurance companies licensed to transact insurance in Florida.
[15] s. 627.351(6)(a)1., F.S.
[16] As of January 2011.
[17] s. 627.351(6)(b).2., F.S.

- Commercial Lines Account (CLA): Commercial residential multi-peril policies including condominium associations, apartment buildings and homeowners association policies as well as commercial non-residential multi-peril (required to include wind coverage) policies (e.g., office buildings, retail, etc.) located outside of the coastal HRA eligible areas.
- High-Risk Account (HRA): Wind-only and multi-peril policies for personal residential, commercial residential, and commercial non-residential risks located in eligible coastal high risk areas.

Under current law, an applicant for coverage with Citizens is eligible even if the applicant has an offer of coverage from an insurer in the private market at its approved rates if the premium for that offer of coverage is over 15 percent more than the premium Citizens would charge for comparable coverage.[18]

Under current law,[19] beginning December 1, 2010, if Citizens' 100 year probable maximum loss[20] (PML) in its wind-only zones is not reduced by 25 percent from what it was in February 2001, the wind-only zones must be reduced by an amount that allows Citizens to reduce its PML by 25 percent. Indications are that Citizens has not been able to reduce its 100 year PML by 25 percent by December 1, 2010 in accordance with this statute. One reason is because Citizens has grown, in part, due to the reluctance of private insurers to expand their writings in Florida because of the significant losses sustained in the 2004 and 2005 hurricane seasons. Therefore, because the required PML reduction will not be accomplished by the statutory deadline, private insurers writing the other peril/non-wind coverage face the choice of either dropping that coverage or writing the windstorm coverage for policies.

**Sinkhole Insurance Issues**

In December 2010, the Senate Banking and Insurance Committee published its interim report on sinkhole insurance (*Issues Relating to Sinkhole Insurance*, Interim Report 2011-104).[21] The report contained findings, many of which are outlined below, along with policy options for lawmakers and stakeholders to consider.[22] Senate Bill 408 contains many of the policy options suggested in the report.

Under current law, insurers offering property insurance must make available to policyholders, for an appropriate additional premium, sinkhole coverage for losses on any structure, including personal property contents.[23] Sinkhole coverage includes repairing the home, stabilizing the

[18] s. 627.351(6)(c)5.a., F.S.
[19] s. 627.351(6)(y), F.S. This law was enacted in 2002.
[20] Probable maximum loss is an estimate of maximum dollar value that can be lost under realistic situations.
[21] The sources for the report included sinkhole policy and claims information collected from 211 insurers for the period 2006 to 2010, pursuant to a data call by the Office of Insurance Regulation. The report also utilized policy and claims data submitted by Citizens Property Insurance Corporation , individual insurers as well as background and research information collected by committee staff. See Senate Interim Report at: http://www.flsenate.gov/data/Publications/2011/Senate/reports/interim_reports/pdf/2011-104bi.pdf
[22] The report presented a series of "options" that would hopefully aid decision makers as they consider various public policy choices related to sinkholes. The report outlined two basic directions the legislature could take in addressing sinkhole coverage: (1) establish a sinkhole repair program; or (2) leave sinkhole coverage in the private insurance market and make substantial changes directed at removing the current cost drivers.
[23] S. 627.706, F.S.

underlying land, and foundation repairs. Insurance companies must also provide coverage for catastrophic ground cover collapse.[24]

Sinkhole insurance claims have increased substantially both in number and cost over the past two decades and most dramatically over the last several years,[25] despite the fact that licensed geologists in Florida state there is no geological explanation for the significant increase in sinkhole claims being reported to insurers. [26] The drastic increase in sinkhole claims is harming the financial stability of Citizens Property Insurance Corporation (Citizens) and private market insurers and making residential property insurance increasingly unaffordable or unavailable for consumers. The Citizens' sinkhole claims frequency ratio more than doubled between 2006 and 2009. In 2009, Citizens incurred over $84 million in sinkhole losses plus adjustment expenses, yet obtained only $19.6 million in earned premium to cover those costs. Private insurers have also seen their sinkhole claims and costs rise by double and triple digit percentages over the past several years. According to data submitted by 211 property insurers to the Office of Insurance Regulation (OIR), their total reported claims increased from 2,360 in 2006 to 6,694 in 2010, totaling 24,671 claims throughout that period. Total sinkhole claim costs for these insurers amounted to approximately $1.4 billion for the same period.

Representatives from OIR, as well as insurers, believe that a major driving force for the significant increase in sinkhole claims is the fact that many policyholders are incentivized to file such claims because they can keep the cash proceeds from the claim instead of effectuating repairs to their home or remediating the land. The failure of sinkhole claimants to make repairs or stabilize land has concerned property appraisers in several counties, particularly in Hernando and Pasco counties. For example, the Hernando Property Appraiser has estimated that since 2005, the county has lost $173 million in total market value as a result of value adjustments to sinkholes homes. Both appraisers believe that this dilemma has had a damaging effect on the market values of affected homes which could lead to financial instability of local governments.

**Current Sinkhole Insurance Law Provisions**

Nationally, property insurance policies typically exclude coverage for "earth movement." In contrast, Florida requires every authorized insurer to make coverage for "sinkhole loss" available, for an additional premium, and also to provide coverage for catastrophic ground cover collapse. "Sinkhole loss," is defined by statute as "structural damage to the building, including the foundation, caused by sinkhole activity." In summary, under current law, for a policyholder to have a sinkhole loss, there must be actual structural damage to her or his home, including the foundation, which is "caused by" sinkhole activity. However, while "sinkhole activity" is defined in statute, "structural damage" is not, which has led to the term not being used in a uniform manner and has spawned debate in litigation over the meaning of the term.

The law provides that once the insurance company is notified of the pending claim, it must inspect the insured's premises to determine if there has been physical damage to the structure

[24] Catastrophic ground cover collapse refers to extreme damage in which a property is essentially destroyed and uninhabitable.
[25] The increase in claims frequency and severity is based on data collected from 211 insurers by the Office of Insurance Regulation (OIR) in the Fall of 2010, (*Report on Review of the 2010 Sinkhole Data Call* (OIR Report),
[26] Jon Arthur, Director, Office of the Florida Geological Survey.

which may be the result of sinkhole activity. If the insurer concludes the damage may be the result of such activity, the carrier will then request a professional engineer or a professional geologist to perform the testing to determine the cause of the loss, within a reasonable professional probability, and to issue a report. The tests performed typically include floor evaluations, ground penetration radar (GPR) and standard penetration test (SPT) borings. Insurers use a variety of testing procedures and according to the OIR Report, the average number of testing procedures has increased for both paid and denied claims. The OIR Report found that the average cost among insurers to provide sinkhole tests was $9,466, while the average cost for Citizens ranged from $8,061 to $10,116.

After the testing is performed, the homeowner is notified of the test results, provided a copy of the report, and given notice of the right to participate in the neutral evaluation program. The test report contains the findings and recommendations of the engineer or geologist as to the cause of loss, a description of the tests performed, and a recommendation as to methods for stabilization and repair. These findings and recommendations are "presumed correct."[27] An insurer may deny a claim if it determines that there is no sinkhole loss; however, if the claim is denied without tests being performed, the policyholder may demand testing and the carrier must comply. If a sinkhole loss is verified, the insurer must pay to stabilize the land and building and repair the foundation in accordance with the report's recommendations, and "in consultation with" the policyholder.[28]

The two most commonly recommended stabilization techniques are grouting and underpinning. Under the grouting procedure, a grout mixture (composed of cement, sand, fly ash, and water) is injected into the ground to stabilize the subsurface soils to minimize further subsidence damage by densifying the soils beneath the building as well as sealing the top of the limestone surface to minimize future raveling. Underpinning consists of steel pipes drilled or pushed into the ground to stabilize the building's foundation. Both of these procedures are expensive. According to geologists and engineers, to stabilize an average $150,000 home, grouting would cost an estimated $75,000, while underpinning would be approximately $35,000; for an average $300,000 home, grouting is estimated to cost $90,000, and underpinning would be $45,000.

The insurer may limit its payment to the insured to the actual cash value of the structure, excluding the underpinning or grouting or other repair technique performed below the foundation, until the policyholder enters into a contract to perform the building stabilization and foundation repairs. The insurer must pay for the repairs after the contract is executed, but may not require the policyholder to advance payment, and may make payments directly to the contractor if written approval is obtained from the policyholder. However, if the repairs have begun and the engineer selected by the insurer determines that such repairs cannot be completed within policy limits, the insurer must either complete the repairs or give policy limits to the policyholder without a reduction for the repair expenses incurred.

Insurers who have paid a claim for sinkhole loss must file a copy of the engineer/geologist report and a certification, including the legal description of the property with the county clerk, who

[27] S. 627.7073, F.S. The issue pertaining to the presumption of correctness of an engineer or geologist report is on appeal to the Florida Supreme Court, *Warfel v. Universal Ins. Co. of North America*, App. 2 Dist., 2010 WL 1874367 (2010).
[28] S. 627.707, F.S. The meaning of the term "in consultation with the policyholder" has caused confusion as to its meaning which has resulted in litigation.

must record the report and certification. The seller of real property upon which a sinkhole claim has been made by the seller and paid by the insurer must disclose to the buyer that a claim has been paid and whether or not the full amount of proceeds were used to repair the sinkhole damage.

**Frequency and Severity of Sinkhole Claims, and Affordability and Availability of Sinkhole Insurance Coverage**

In the OIR Report of insurer sinkhole claims data (2006 and 2010), the agency received information on 8,959 open claims and 15,712 closed claims, totaling 24,671. Specifically, the data shows:

- Total sinkhole claims increased from 2,360 in 2006 to 7,245 in 2009.
- Total sinkhole losses for closed and open claims combined increased from $209 million in 2006 to $406 million in 2009.
- Total losses for open and closed claims exceeded $1.4 billion over the 4-year period.

The statutory requirement for sinkhole testing consists of an inspection and the geologist/engineering report. In 2006, the sum of the two testing components totaled $20.4 million in expenses. By 2009, however, that total nearly tripled to almost $58 million, attributable to the increase in the number of claims. The data indicate companies must routinely incur extensive and costly testing procedures to adjust a sinkhole claim.

The data indicates a wide variation in the frequency of claims, depending on the geographic region. For example, for the period 2006-2009 over 88 percent of the claims occurred in eleven counties: Hernando, Pasco, Hillsborough, Pinellas, Marion, Polk, Orange, Alachua, Citrus, Miami-Dade, and Broward. Over 66 percent (11,872) of the claims are concentrated in just three counties—Hernando, Pasco and Hillsborough, with Citizens accounting for 36 percent of the total claims (4,261). Miami-Dade and Broward are showing a recent increase in sinkhole claims as those counties represented 2.9 percent of total claims from 2006-2009, but have increased to 4.2 percent for the year to date in 2010. This is statistically significant due to the fact that this area is generally not subject to sinkhole activity.

**Citizens Property Insurance Corporation Provision of Sinkhole Coverage**

- The largest writer of sinkhole coverage in Florida is Citizens, particularly in the three counties of greatest activity (Hernando, Pasco and Hillsborough). Citizens' claims data for the years 2005 through 2009 shows the large deficiency in the premium Citizens' collects to cover sinkhole claims, particularly in the most active areas. For example, in 2009, for Citizens:
- The statewide pure premium[29] for sinkhole coverage was $295, quadruple the $73 premium that Citizens was allowed to charge for sinkhole coverage.

[29] Pure premium is the amount that all policyholders with sinkhole coverage would need to pay to cover the sinkhole losses (with no profit or indirect costs added).

- The total premium collected statewide for the sinkhole endorsement ($22.2 million) was exceeded by sinkhole losses[30] from Hernando ($40.5 million) and Pasco ($24.9 Million) counties.
- Sinkhole losses from Hernando ($40.5 million) were almost seven times the $5.9 million premium that was collected to cover those losses. Sinkhole losses in Pasco ($24.9 million) were three times the total sinkhole premium of $8.3 million.

**Citizens' Sinkhole Claims Frequency & Severity**

The dramatic increase in sinkhole claims is the primary cost driver for Citizens' significant sinkhole losses. Statewide, the number of sinkhole claims more than doubled between 2005 and 2009, rising from 660 in 2005 to 1404 in 2009. The increase in sinkhole claims has occurred in spite of the fact that significant numbers of policyholders have dropped sinkhole coverage since it became an optional endorsement in 2007. The percent of Citizens' statewide policies with sinkhole coverage fell from 100 percent in 2006 (when it was mandatory) to 61 percent in 2009. In 2009, only 37 percent of policyholders in Hernando County and 22 percent of policyholders in Pasco County purchased Citizens' policies with sinkhole coverage. As a result of the substantial reduction in the number of people choosing to pay for sinkhole coverage, there are fewer policyholders (and less collected premium) over which to spread the increasing losses. Notwithstanding the substantial reduction in the number of policyholders choosing sinkhole coverage, there has still been an increase in the number of sinkhole claims being filed.

Average claims severity is the average amount of cost that Citizens incurred (indemnity plus loss adjustment expenses) for all claims for which a payment was made. The coverage A limit is the amount for which the main structure (house) is insured. In 2005, the statewide average severity of $123,412 actually exceeded the average coverage A limit of $115,540. In 2006 through 2009, the average severity was lower than the coverage A limit, but remained extremely high relative to other covered perils. In 2009, the average severity dropped significantly, but the data is based on a lower percentage of closed claims than the data for earlier years. Even with the drop in average severity in 2009, total overall losses for sinkholes increased due to the large increases in claim frequency.

**Effect of Sinkholes on the Affordability and Availability of Citizens Coverage**

There is a great variation in the cost of Citizens' sinkhole coverage, depending on the geographic region of the state. In 2009, the statewide average sinkhole premium was $73, the average premium was $944 in Pasco County, $775 in Hernando County, and $98 in Hillsborough County. The average sinkhole premium for the remainder of the state (excluding Pasco, Hernando and Hillsborough) was only $22. This deficiency in premiums is worsening because Florida law prohibits Citizens from increasing the rate of any policyholder by more than approximately 10 percent, even as losses continue to rise at a much faster pace. Thus, Citizens' already deficient sinkhole premiums will fall even further behind its sinkhole losses and Citizens' surplus will continue to erode.

[30] "Losses" refers to indemnity costs for both open and closed claims, plus loss adjustment expenses (LAE). A loss adjustment expense (LAE) is the direct cost associated with investigating, administering, defending, or paying an insurance claim.

Most private insurers and Citizens have implemented, or are implementing, some form of property (including home) inspection program in which the property must meet specified criteria to qualify for sinkhole coverage. As more companies adopt pre-coverage inspection requirements, sinkhole coverage will continue to become less available. It has been reported to committee staff that many private insurers have ceased writing new business in the areas of greatest sinkhole claims activity. In Hernando and Pasco counties, Citizens' share of the homeowners' insurance market has increased substantially in each of the last two years.

**Areas of Concern Regarding Sinkhole Claims Process**

The following topics have been identified by committee staff as areas of concern regarding the sinkhole claims process based on interviews and data collected from stakeholders.

**Failure of Sinkhole Claimants to Repair Property or Stabilize Land**

Representatives with the OIR, Citizens, as well as insurers, believe that the significant increase in sinkhole claims is driven by the ability of policyholders to often keep the cash proceeds from the claim instead of effectuating repairs to their home or remediating the land. The failure of sinkhole claimants to make repairs or stabilize land has concerned many property appraisers, most notably in Hernando and Pasco counties. Both property appraisers have indicated that this problem has had a damaging effect on the market values of affected homes which could lead to financial instability of local governments. Hernando County Property Appraiser, Alvin Mazourek, has estimated that since 2005, the county has lost $173 million in total market value as a result of value adjustments to sinkhole homes while Pasco County Property Appraiser, Mike Wells, has cited a reduction in property values in his county of over $50 million.

**Requiring Policyholders to Remediate or Repair**

The state has a public policy interest in ensuring that policyholders use insurance proceeds to remediate sinkhole activity. The failure of one policyholder to remediate sinkhole conditions underlying his or her property can subsequently affect their neighbor whose property may also experience sinkhole loss. Additionally, property values of nearby homes may be negatively affected. The statutory provisions requiring the policyholder to enter into a contract before receiving insurance proceeds are designed to ensure that insurance proceeds from a sinkhole loss are used to remediate sinkhole conditions. However, these statutory provisions have little relevance when the policyholder contests the claim. When the insurer and the policyholder settle a claim, the settlement agreement is highly unlikely to contain any condition that settlement proceeds be used to remediate the property. Any statutory attempt to require settlement proceeds to be used to remediate sinkhole conditions may well be interpreted to be an unconstitutional impairment of contract that impermissibly limits the right of the parties to the insurance contract to discharge their respective rights and liabilities via a settlement contract agreement. The only way to ensure that sinkhole proceeds are used to remediate sinkhole conditions is to create an environment where insurance proceeds are paid under the policy of insurance and fewer claims are contested by policyholders.

**Sinkhole Statutory Provisions**

Various provisions of the statutes governing insurance for sinkhole loss are the subject of ongoing litigation between policyholders and insurers. The provisions noted below appear to be fostering litigation between the parties, are creating uncertainty as to the meaning of the statutory language, or have inefficiencies that can be remedied through amendment.

*Presumption of Correctness* - Section 627.7073(1)(c), F.S., states that a sinkhole report is "presumed correct" if it conforms to statutory standards. Currently on appeal before the Florida Supreme Court is *Warfel v. Universal Ins. Co. of N.A.*, in which the Court will determine whether the presumption of correctness shifts the burden of proof to the insured or merely requires the insured to produce evidence regarding the facts at issue, at which point the presumption disappears. The statutory requirements for the handling and investigation of sinkhole claims give deference to the findings and recommendations of the engineering and geological professionals retained by an insurer to investigate a sinkhole claim. The provisions are designed to improve the availability and affordability of sinkhole coverage by reducing litigation. When a sinkhole loss is verified in the sinkhole report, s. 627.707(5)(a), F.S., requires the insurer "to pay to stabilize the land and building and repair the foundation" of the policyholder "in accordance with the recommendations of the professional engineer as provided under s. 627.7073…." The Second DCA's decision in *Warfe*l eliminates the presumption in favor of the insurer when the report is challenged in a court of law. Regardless of the result of the Florida Supreme Court decision in *Warfel*, the Legislature should consider clarifying the applicability of the presumption of correctness in s. 627.7073, F.S.

*In Consultation With the Policyholder* – Section 627.707(5), states that when a sinkhole loss is verified, the insurer must pay for repairs recommended by the engineers and geologists retained by the insurer "in consultation with the policyholder." The statute is arguably ambiguous as to what the statute is requiring when it directs the insurer to conduct repairs "in consultation with the policyholder." Insurers assert that the phrase means providing notice to the policyholder regarding payment of claim proceeds to conduct repairs. Some insureds and their representatives assert that the phrase requires the insurance company to essentially reach an agreement with the policyholder regarding the method of repair to be used to remediate the confirmed sinkhole. The issue has become the subject of litigation in sinkhole claims. Clarification of the "in consultation with the policyholder" language may serve to remove the differing interpretations by the parties to the insurance contract.

*Structural Damage* – Section 627.706, F.S., defines a sinkhole loss as "structural damage to the building, including the foundation, caused by sinkhole activity." Pursuant to the statutory definition of "sinkhole loss," insurers are required to provide coverage for "structural damage to the building, including the foundation, caused by sinkhole activity." The statute does not define the term "structural damage." The result is uncertainty as to how the Florida Statutes define sinkhole loss and precisely what coverage Florida Statutes mandate insurers make available. The term "structural damage" is currently being defined in one of two ways. Some parties state that the term means simply "damage to a structure." The second definition asserts that structural damage is damage that affects the load bearing capacity of the structure.[31]

[31] The 2007 Florida Building Code (FBC): Existing Building (1st Printing) defines "structural" to mean "any part, material or

*Statute of Limitations* – Under current law, there is no Florida statute of limitations for making a property insurance claim. The statute of limitations for bringing a breach of contract claim is five years. In sinkhole claims, the insured has five years from the date of the insurer's alleged breach to bring a breach of contract suit. Setting an actual date of loss for a sinkhole claim is difficult and often depends on the truthfulness of the insured in stating when possible sinkhole-related damage first appeared. Unfortunately, this allows some insureds to engage in questionable practices in an effort to maximize recovery. One such practice is backdating the date of loss to pre-June 1, 2005, to avoid the statutory requirement to perform repairs. Insureds seeking maximum policy limits may choose a date of loss under the policy term with the greatest limits. Policyholders with Citizens may attempt to circumvent Citizens' bad faith immunity by alleging a sinkhole date of loss under the prior insurer's policy.

*Disputed Sinkhole Claims/Neutral Evaluation Program* – In 2006, the Legislature established an alternative process for resolving sinkhole disputes called "neutral evaluation." The Department of Financial Services (DFS) certifies engineers and geologists to serve as "neutral evaluators" of sinkhole claims disputes. If the parties do not reach a settlement, the neutral evaluator renders an opinion whether a sinkhole loss has been verified and, if so, the estimated cost of repairs. Neutral evaluation is mandatory if requested by either party, but nonbinding, and the costs are paid by the insurer. The neutral evaluator's written recommendation is admissible in any subsequent action or proceeding relating to the claim. Individuals involved in the neutral evaluation process have expressed the following concerns.

- Neutral evaluators may not be truly neutral, and may be biased because there are no conflict of interest standards.
- Neutral evaluators are sometimes asked to render opinions outside of their area of expertise.
- The scope of duties of a neutral evaluator are not clear and the issues to be determined by the neutral evaluator are not clearly specified in statute.
- Neutral evaluation makes it difficult to utilize the appraisal clause of the insurance policy.
- Time frames imposed by statute need to be revised pursuant to recommendations by DFS staff so that the evaluation procedure is conducive to settling claims.
- The funding for DFS to operate the neutral evaluation program does not cover its administrative costs.

*Public Adjuster Participation and Solicitation in Sinkhole Claims* - Under current law, a public adjuster is defined as any person, other than a licensed attorney, who, for compensation, prepares or files an insurance claim form for an insured or third party claimant in negotiating or settling an insurance claim on behalf of the insured or third party. During the 2005 – 2009 period in which the number of sinkhole claims has risen sharply, the percentage of sinkhole claimants who are represented by public adjusters has increased significantly. Citizens reports that in 2005, only three percent of all sinkhole claims had public adjuster involvement, but by 2009, 25 percent of

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assembly of a building or structure which affects the safety of such building or structure and/or which supports any dead or designed live load and the removal of which part, material or assembly could cause, or be expected to cause, all or any portion to collapse or fail." The FBC for existing buildings also defines a condition called "substantial structural damage" which essentially constitutes damage that reduces the load-bearing capacity of the structure beyond a certain level. The FBC definitions of "structural" and "severe structural damage" indicate that the when the term "structural" is used in an engineering context, the term refers to the load bearing capacity of a building.

its statewide sinkhole claimants were represented by public adjusters. Many insurers believe that the increase in public adjuster involvement with sinkhole claims is a result of the aggressive advertising and solicitation campaigns used by public adjusting firms in the regions where the greatest number of sinkhole claims are filed.

**Florida Hurricane Catastrophe Fund**

The FHCF is a tax-exempt fund created in 1993 after Hurricane Andrew as a form of mandatory reinsurance for residential property insurers. All insurers that write residential property insurance in Florida are required to buy reimbursement coverage (reinsurance) on their residential property exposure through the FHCF. The FHCF is administered by the State Board of Administration (SBA) and is a tax-exempt source of reimbursement to property insurers for a selected percentage (45, 75, or 90 percent) of hurricane losses above the insurer's retention (deductible).

The FHCF provides insurers an additional source of reinsurance that is significantly less expensive than what is available in the private market, enabling insurers to generally write more residential property insurance in the state than would otherwise be written. Because of the low cost of coverage from the FHCF, the fund acts to lower residential property insurance premiums for consumers. The FHCF must charge insurers the "actuarially indicated" premium for the coverage provided, based on hurricane loss projection models found acceptable by the Florida Commission on Hurricane Loss Projection Methodology.

The FHCF provides reimbursement to insurers for "losses" caused by a hurricane. Section 215.555(2)(d), F.S., defines "losses" as a "direct incurred losses" under covered policies. A direct incurred loss is a loss in which the insured peril is the proximate cause of damage. Sunshine State Insurance Company is challenging the SBA's interpretation of the statute that attorney's fees paid by an insurer to insureds pursuant to a negotiated or court-ordered settlement are not direct incurred losses and thus are not reimbursable under the FHCF contract. The Division of Administrative Hearings has scheduled a hearing on the dispute for April 4-5, 2011.

## III. Effect of Proposed Changes:

**Section 1** amends s. 215.555(2)(d), F.S., defining what constitutes "losses" under the Florida Hurricane Catastrophe Fund. The bill expands the definition of "losses" to include "all incurred losses" under covered policies, rather than "direct incurred losses." The bill also specifies that losses include amounts paid as fees on behalf of the policyholder. This change specifies that the FHCF must provide reimbursement for attorney's fees and public adjuster fees. The bill also specifies items that are not considered losses and thus are not reimbursable, which is designed to prevent FHCF reimbursement for losses that historically have not been covered by the fund because they were not "direct incurred losses." The statute currently excludes losses for fair rental value, rental income, or business interruption losses. The bill specifies that the following are also not reimbursable losses.

- Liability coverage losses.
- Property losses that are not primarily caused by a hurricane.
- Amounts paid because the insurer voluntarily expanded coverage, such as the waiver of a deductible.

- Reimbursement to the policyholder for an assessment levied by a condominium association or homeowners' association.
- Bad faith awards, punitive damage awards, and court-imposed fines, sanctions, or penalties.
- Amounts paid in excess of the insurance policy coverage limit.
- Allocated and unallocated loss adjustment expenses.

**Section 2** specifies that the amendment to s. 215.555, F.S., will apply to the FHCF reimbursement contract that is effective June 1, 2011. The 2011 FHCF reimbursement contracts will be executed on March 1, 2011, effective June 1, 2011. Application of the new definition of "losses" likely will be applied to the 2011 contract through an amendment executed by the SBA and the insurer.

**Section 3** amends 624.407, F.S., relating to surplus fund requirements for new insurers, to require that, to receive a certificate of authority to transact insurance in Florida, a new domestic residential property insurer that is not a wholly-owned subsidiary of an insurer domiciled in another state have a $15 million surplus. The current surplus requirements for new residential property insurers is $5 million, unless it is a wholly-owned subsidiary of an insurer domiciled in another state, in which case the minimum requirement is $50 million.

**Section 4** amends 624.408, F.S., relating to the surplus fund requirements for current insurers, to requires that a residential property insurer holding a certificate of authority before July 1, 2011, have a surplus of: $5 million until June 30, 2016; $10 million from July 1, 2016, until June 30, 2021; and $15 million thereafter. If the residential property insurer does not hold a certificate of authority before July 1, 2011, it must have a surplus of $15 million. The current surplus requirement for a residential property insurer to maintain its certificate is $4 million.

**Section 5** creates s. 624.4095(7), F.S., regarding liabilities related to federal multi-peril crop insurance. Some insurers that provide multi-peril crop insurance cede the entire risk to the Federal Crop Insurance Corporation or to a private reinsurer. Insurers that provide crop insurance coverage in this way encounter two special problems that this bill is intended to address.

Current law limits the ratio of gross written premiums for property insurers to nine times the surplus as to policyholders, and requires surplus to be at least ten percent of total liabilities. When a primary insurer cedes all of the crop risk to a reinsurer, it is not underwriting any of the loss, so it is not necessary to limit its gross written premiums directly to a ratio of its surplus. The bill provides that gross written premiums that are ceded to the Federal Crop Insurance Corporation or to an authorized reinsurer will not be included in the calculation of an insurer's gross writing ratio.

The second problem for these insurers is that it is unrealistic to limit the total liabilities to 10 times the surplus. This is because the primary insurer cedes the entire risk, so it carries a very large balance of reinsurance premiums payable (a liability). This payable balance is almost entirely offset by recoverables (an asset) from the reinsurers, but that does not reduce the "gross" liability that cannot exceed 10 times the surplus. The bill provides that the liabilities for the ceded reinsurance premiums payable for coverage ceded to the Federal Crop Insurance Corporation or an authorized private reinsurer will be netted against the asset for the amounts

recoverable from those reinsurers. It will then be this "netted" amount that would be compared to the insurer's surplus.

**Section 6** amends s. 624.424, F.S., regarding use of accountants to prepare annual audits and audited financial reports. The bill enacts prohibitions recommended by the National Association of Insurance Commissioners that prohibit an insurer from using the same accountant or partner of an accounting firm to prepare its annual audit and audited financial report for more than five consecutive years, and to require a five year waiting period before the accountant or partner can be retained by the insurer for that purpose. Current law permits use of the same accountant or partner for 7 straight years followed by a two-year waiting period.

**Section 7** amends s. 626.854, F.S., effective June 1, 2011, to limit public adjuster compensation to 20 percent of the reopened or supplemental claim payment for residential property insurance or condominium association policy claims. The public adjuster's compensation must solely be based on the claim payments or settlement obtained through the public adjuster's work after contracting with the insured or claimant.

The bill also clarifies the application of the limit on public adjuster compensation for claims paid within one year of a state of emergency. A public adjuster's compensation is limited to 10 percent of insurance claims payments made within one year of an event declared by the Governor to be a state of emergency. The limit is raised to 20 percent for claims payments for such events that are made more than one year after the declaration of emergency.

**Section 8** amends s. 626.854, F.S., effective January 1, 2012.

**Unfair and Deceptive Statements in Public Adjuster Advertisements**

The bill specifies statements by a public adjuster in an advertisement or solicitation that constitute an unfair or deceptive insurance trade practice pursuant to s. 626.9541, F.S.:

- Inviting the policyholder to file a claim when there is no covered damage to insured property.
- Offering the policyholder monetary or valuable inducement to file a claim.
- Inviting a policyholder to file a claim by stating there is "no risk" to the policyholder.
- Making a statement or representation or using a logo that implies or mistakenly could be construed to imply that the solicitation is made or sanctioned by a governmental entity.

**Requires Disclaimer on Public Adjuster Advertisements**

The bill requires the following disclaimer on public adjuster advertisements in newspapers, magazines, flyers, and bulk mailers: "This is a solicitation for business. If you have had a claim for an insured property loss or damage and you are satisfied with the payment by your insurer, you may disregard the advertisement."

**Insurer Claims Investigations**

The bill requires that the insurance company adjuster, independent adjuster, investigator, or attorney provide at least 48 hours notice to the insured or insured's representative before

scheduling a meeting with the claimant or on-site investigation of the insured property. The insured or claimant may waive the notice requirement. A public adjuster is required to give prompt notice of a property insurance claim to the insurer. The public adjuster must ensure that notice of the claim is given, that the insurer receives a copy of the public adjuster's contract, that the property is available for the insurer's inspection, and that the insurer may interview the insured directly about the loss. The public adjuster may be present during the insurer's inspection of the property, but the public adjuster's unavailability may not delay the insurer's timely inspection.

**Prohibition on Contractors Adjusting Claims**

A licensed contractor or subcontractor is prohibited from adjusting a claim on the insured's behalf unless licensed as a public adjuster.

**Section 9** amends s. 626.8651(6), F.S., to require a public adjuster apprentice to meet continuing education requirements (minimum 8 hours, including 2 hours of ethics) in order to obtain licensure as a public adjuster. The provision is effective January 1, 2012.

**Section 10** amends s. 626.8796, F.S., regarding public adjuster contracts, effective January 1, 2012, to require that the public adjuster contract include the adjuster's name, business address, license number, and public adjusting firm's name. The contract must also include the insured's name and street address. A brief description of the loss and the type of claim involved (emergency, non-emergency, supplemental) and the percentage of the public adjuster's compensation must also be included. The contract must be signed and dated by the public adjuster and all named insureds. If all named insureds cannot sign the contract, the public adjuster must submit a signed affidavit that the signatories have authority to enter the contract and settle all claims issues on behalf of all named insureds. The public adjuster must provide a copy of the executed contract to the insurer within 30 days of its execution.

Current law also requires the public adjuster contract to provide notice that any person who injures, defrauds, or deceives an insurer or insured commits a third degree felony.

**Section 11** creates s. 626.70132, F.S., regarding notice of a hurricane or windstorm claim, to require that notice of a new, reopened, or supplemental hurricane or windstorm property insurance claim be provided within three years of the hurricane first making landfall or the windstorm causing the covered damage. A supplemental or reopened claim is defined in this section as an additional claim for recovery made from the same hurricane or windstorm that the insurer previously adjusted. The section does not affect any applicable statute of limitations provided in s. 95.11, F.S.

**Section 12** repeals s. 627.0613(4), F.S., to eliminate the requirement that the Insurance Consumer Advocate annually prepare a report card for each authorized personal residential property insurer.

**Section 13** amends s. 627.062, F.S., regarding the rate standards applicable to property, casualty and surety insurance. The bill makes multiple substantive and clarifying changes regarding the

submission of rates by insurers and their approval or denial by the Office of Insurance Regulation. This section:

- Requires the office to issue an approval or notice of intent to disapprove of a "file and use" rate filing within 90 days of the filing's submission. Currently the Office is required to issue a "notice of intent to approve" instead of an approval.
- Prohibits the OIR from impeding an insurer's right to acquire policyholders, advertise, or appoint agents, including agent commissions.
- No longer prohibits the following acts in order for an insurer to make a separate filing related to reinsurance or financing products that replace Florida Hurricane Catastrophe Fund Temporary Increase in Coverage Limits (TICL) coverage.
    - Including expenses or profit for the insurer.
    - Including other changes in its rate in the filing.
    - Having implemented a rate increase in the past 6 months.
    - Filing for a rate increase within 6 months of approval.
- Deletes language related to the development of a standard rating territory plan for use by all insurers for residential property insurance.
- Deletes obsolete language related to implementation of the presumed factor for medical malpractice insurance pursuant to the 2003 medical malpractice reforms.
- Deletes obsolete language prohibiting property insurance filings from being made on a "use and file" basis. The language only applies to filings made before December 31, 2010.
- Limits the OIR's authority to disapprove rate filings for sinkhole insurance. Under the bill, the OIR may only deny the rate filing if the rate is inadequate, or charges the policyholder or applicant a higher premium based on race, religion, sex, national origin, or marital status.

**Section 14** amends s. 627.0629, F.S., regarding windstorm damage mitigation discounts for residential property insurance.

**Mitigation Discounts**

Current law requires rate filings for residential property insurance to take the presence of mitigation techniques into account and provide actuarially reasonable credits, discounts, and reduced deductibles for mitigation techniques. The bill specifies that the rate filing must also consider the absence of mitigation techniques and include actuarially reasonable debits or increases in deductibles that recognize the absence of mitigation techniques.

The bill specifies that the aggregate amount of mitigation discounts granted by an insurer should not exceed the aggregate expected reduction in losses resulting from the mitigation techniques. An insurer that demonstrates that its aggregate mitigation discounts exceed the expected reduction in aggregate loss created by the mitigation may recover the lost revenue through an increase in its base rates. The bill deletes the requirement that the OIR develop a method of calculating mitigation discounts that directly correlates to the uniform home grading scale.

**Implementation of Approved Rates Over Multiple Years**

Current law allows an insurer to implement an approved rate filing over multiple years in order to provide an appropriate transition period for policyholders. Insurers are permitted to include the

actual cost of private market reinsurance that replaces Florida Hurricane Catastrophe Fund TICL coverage within the rate. The bill allows the portion of the rate that corresponds to the cost of reinsurance to replace TICL coverage to include an expense or profit load.

**Section 15** amends s. 627.351(6), F.S., regarding Citizens Property Insurance Corporation.

**Renames the High Risk Account**

The bill renames the Citizens "High Risk Account" the "Coastal Account." The account is being renamed to improve Citizens' bargaining position when dealing with outside investors, as the current name "High Risk Account" has a negative connotation.

**Citizens Policyholder Surcharge**

The bill specifies that the Citizens policyholder surcharge is payable upon cancellation, termination, renewal, or issuance of a new policy within 12 months after imposition of the surcharge or the period of time necessary to collect the surcharge. Citizens cannot levy a regular assessment until it has levied the full amount of the Citizens policyholder surcharge. Current law is less specific regarding when the surcharge is due, only stating that it is to be collected when the insurance policy is issued or renewed.

**Repeals Requirement to Reduce High Risk Area**

Citizens is authorized to offer policies that that provide coverage only for the peril of wind for risks located within the high risk/coastal account. The high risk area of the high risk/coastal account consists of areas that were eligible for coverage in the Florida Windstorm Underwriting Association, essentially coastal areas at high risk for a hurricane. The bill repeals the requirement to reduce the high-risk area after December 1, 2010, if necessary to reduce the probable maximum loss attributable to wind-only coverages to 25 percent below the "benchmark" for the high-risk area, which is defined in statute as the 100-year probable maximum loss for the Florida Windstorm Underwriting Association based on its November 30, 2000, exposures. The bill also repeals a requirement to reduce the high-risk area after February 1, 2015, by 50 percent below the benchmark.

Repeal of the requirement to reduce the high risk area prevents the reduction of Citizens exposure to losses due to hurricane loss under wind-only policies in coastal areas. However, reduction of the high risk area might also reduce the number of private market carriers providing coverage in coastal areas. Currently private market insurers are able to provide coverage to risks in the coastal area that exclude wind. If such insurers are required to cover wind, they may choose not to write the policy with the eventual result perhaps being that the entire risk is insured by Citizens.

**Citizens Board of Governors**

Members of the board with insurance experience are deemed to be within the exception in s. 112.313(7)(b), F.S., that allows a public officer to practice a particular profession or occupation when required or permitted by law or ordinance.

The bill provides procedures for board members who have a conflict of interest regarding a particular matter. A Citizens board member may not vote on any measure that would inure to the gain or loss of the board member; the board member's corporate principal or the parent or subsidiary of the corporate principal; or the relative or business associate of the board member. A board member with a conflict must state his or her interest in the matter prior to the vote being taken. The board member must also provide written disclosure of the conflict within 15 days after the vote, and the disclosure must be included in the minutes of the board meeting and available as a public record.

**Section 16** amends s. 627.3511(5)(a), F.S., to provide conforming changes regarding the name change of the Citizens coastal account.

**Section 17** amends s. 627.4133, F.S., regarding the written notice requirements for nonrenewal of a policy.

**Notice of Nonrenewal for Personal or Commercial Residential Property Insurance Policies**

The bill creates a uniform 90-day written notice requirement for the nonrenewal, cancellation, or termination of a personal lines or commercial residential property insurance policy. Under current law, an insurer must provide 100 days written notice. However, if the insurer has covered the insured's property for the last five years or more then 180 days written notice is required. If the insured has been with the insurer for less than five years but the nonrenewal, cancellation, or termination is effective between June 1 and November 30, then the insurer must give the greater of 100 days written notice or notice by June 1.

**Notice of Nonrenewal for Citizens "Take-out" Policies**

The bill requires Citizens to provide 45 days notice of nonrenewal to the policyholder for a policy that has been assumed by an authorized insurer. For such policies, Citizens is exempt from the notice requirements of paragraph (2)(a) and (2)(b) apply to policies for personal lines and commercial residential property insurance. Paragraph (2)(a) requires the insurer to provide 45 days written notice of the renewal premium. Paragraph (2)(b) contains a number of notice requirements pertaining to the nonrenewal, cancellation, or termination of the policy.

**45-Day Notice of Cancellation or Non-Renewal of Property Insurance Policies**

An insurer may cancel or nonrenew a property insurance policy after 45 days notice if the OIR finds that the early cancellation of policies is necessary to protect the best interests of the public or policyholders and the office approves the insurer's plan for early cancellation or nonrenewal. Acceptable grounds for early cancellation or nonrenewal may include the insurer's financial condition, the lack of adequate reinsurance for hurricane risks, or other relevant factors. The office may condition its findings on the consent of the insurer to be placed under administrative supervision pursuant to s. 624.81, F.S., or the appointment of a receiver under ch. 631, F.S.

**Section 18** creates s. 627.73141, F.S., which allows insurers to change policy terms for a renewal policy of personal lines property insurance without cancelling the policy and providing a notice of cancellation.

**Notice of Change in Policy Terms**

The bill authorizes insurers to renew a personal lines property and casualty insurance policy under different terms by providing to the policyholder a written "Notice of Change in Policy Terms" instead of a written "Notice of Non-Renewal." The Notice must be titled "Notice of Change in Policy Terms," give the insured written notice of the change, and be enclosed with the written notice of renewal premium. The insured is deemed to have accepted the change in policy terms upon the insurer's receipt of the premium payment for the renewal policy. If the insurer fails to provide the Notice of Change in Policy Terms the original policy terms remain in effect. The bill also provides Legislative intent language stating that the section is designed to allow insurers to change policy terms without nonrenewing policyholders, alleviate policyholder confusion caused by the required policy nonrenewal when an insurer intends to renew the policy under different terms, and encourage policyholders to discuss their coverages with insurance agents. Currently, when an insurer wants to change the terms of the insurance contract by which it provides coverage to the insured at renewal, it must provide the insured with a written Notice of Non-Renewal in compliance with the time frames for notice requirements provided for in statute.

**Section 19** amends s. 627.7011, F.S., regarding insurer payment of losses insured on a replacement cost basis.

**Payment of Losses to Dwellings Insured on Replacement Cost Basis**

The insurer must initially apply the deductible and pay the actual cash value of the insured loss. The policyholder must then contract for the performance of building and structural repairs, which triggers the insurer's obligation to pay any remaining amounts incurred to perform the repairs as the work is performed. The insurer may waive the requirement that the policyholder contract for repairs. The insurer, contractor, or subcontractor may not require the policyholder to advance payment for repairs except for incidental expenses to mitigate further damage. The insurer must pay replacement cost coverage without reservation or holdback of any depreciation if a total loss occurs in accordance with s. 627.702, F.S., the valued policy law.

**Payment of Personal Property Losses on Replacement Cost Basis**

The insurer may limit its initial payment to the actual cash value of the personal property. The insurer must pay the reservation or holdback upon the insured's providing a receipt for the replaced property. The insurer must provide clear notice of the payment process in the insurance contract. The insurer is prohibited from requiring the policyholder to advance payment to replace property.

**Section 20** amends s. 627.70131(5)(a), F.S., regarding payment of property insurance claims, to require that an initial, reopened, or supplemental property insurance claim be paid or denied by the insurer the later of:

- 90 days after receiving notice of the claim unless there are factors beyond the insurer's control that reasonably prevent payment; or
- 15 days after there are no longer factors beyond the control of the insurer that reasonably prevented payment.

Current law contains the timeframes for payment of a claim described above, but simply says they apply to a property insurance claim. This has resulted in disputes regarding the time frame the insurer has to make a payment for a reopened or supplemental property insurance claim.

**Section 21** provides a statement of Legislative findings regarding sinkhole loss insurance coverage. The findings include the following declarations.

- There is a compelling state interest in maintaining a viable and orderly property insurance market.
- The 2005 legislative revisions to the sinkhole statutes (ss. 627.706-627.7074, F.S.) are designed to increase reliance on objective, scientific testing requirements and reduce the number of sinkhole claims and disputes arising under the prior law.
- The Legislature finds that losses associated with sinkhole claims adversely affect the public health, safety, and welfare of this state and its citizens. The Legislature determined that since the 2005 statutory revisions, both private-sector insurers and Citizens have experienced high claims frequency and severity for sinkhole insurance claims. Additionally, many properties remain unrepaired even after loss payments, which reduce the local property tax base and adversely affect the real estate market.
- Sections 19 through 24 of the act clarify technical or scientific definitions adopted in the 2005 legislation in order to reduce sinkhole claims and disputes.
- The legal presumption intended by the Legislature is clarified to reduce disputes and litigation associated with technical reviews associated with sinkhole claims.
- Other statutory revisions advance legislative intent to rely on scientific or technical determinations relating to sinkholes and sinkhole claims, reduce the number and cost of sinkhole claim disputes, and ensure that repairs are made pursuant to scientific and technical determinations and insurance claims payments.

**Section 22** amends s. 627.706, F.S., which currently requires property insurers to offer sinkhole coverage to each policyholder for an additional premium and requires that coverage for catastrophic ground cover collapse be included in every property insurance policy. The bill makes the following changes:

**Removes the Requirement that Insurers Offer Sinkhole Coverage**

Insurers no longer must make sinkhole coverage available. Instead, insurers are authorized to make the coverage available but are not required to do so. Insurers are also allowed to restrict sinkhole coverage to the principal building.

**Sinkhole and Catastrophic Ground Cover Collapse Insurance Only Applies to Residential Property Insurance**

Property insurers covering commercial risks will no longer be bound by the requirement to include coverage for catastrophic ground cover collapse coverage and the provisions of the section regarding sinkhole coverage. Only insurers transacting *residential* property insurance as described in s. 627.4025, F.S., will be required to include catastrophic ground cover collapse and will be governed by the provisions of the bill authorizing sinkhole coverage. Section 627.4025, F.S., defines residential coverage as follows.

- Personal lines coverage which consists of homeowner's, mobile homeowner's, dwelling, tenant's, condominium unit owner's, cooperative unit owner's, and similar policies.
- Commercial lines residential coverage which consists of condominium association, cooperative association, apartment building, and similar policies, including policies covering the common elements of a homeowner's association.

**Applies the Sinkhole Deductible to the Sinkhole Investigation**

The sinkhole deductible will apply to any expenses incurred by the insurer in investigating a sinkhole claim. Separate deductibles for sinkhole coverage are currently authorized to be equal to one, two, five, or ten percent of the policy dwelling limits.

**Redefines Sinkhole Loss Coverage**

The bill changes the definition of "sinkhole loss," primarily by creating a statutory definition of "structural damage." Sinkhole loss is currently defined as "structural damage to the building, including the foundation, caused by sinkhole activity." However, "structural damage" is not defined by statute. The bill defines structural damage as the occurrence of all of the following.

- A covered building suffers foundation movement outside an acceptable variance under the applicable building code; and
- Damage to a covered building, including the foundation, that prevents the primary structural members and/or primary structural systems from supporting the loads and forces they are designed to support; and
- The loss meets any additional conditions contained in the insurance policy.

Accordingly, in order for the policyholder to obtain policy benefits for sinkhole loss, the insured structure must sustain structural damage as defined by the bill that is caused by sinkhole activity and any additional conditions contained in the insurance policy. Contents coverage and additional living expense coverage is only available if there is *structural* damage to the covered building caused by sinkhole activity. The bill also specifies that "sinkhole loss" means structural damage to the *covered* building.

The definition of sinkhole loss is also modified by the bill's amendment of the definition of sinkhole activity. The bill specifies that *contemporary* movement or raveling of soils is necessary for sinkhole activity to occur. Merriam-Webster's defines "contemporary" in two different ways, and either definition arguably could apply. The term can either refer to something that exists or

occurs within the current modern time period or can mean simultaneous or within the same time period. The first definition would require the movement or raveling of soils to have occurred recently. The second definition would require it to have occurred within the same time period as another event, which could mean that the weakening of the earth supporting the property would result from soil movement that occurred at roughly the same time, but would not necessarily require both events to have occurred recently.

**Two Year Sinkhole Claim Deadline**

The bill requires a policyholder to provide notice to the insurer of a new, supplemental, or reopened claim for sinkhole loss within 2 years after the policyholder knew or should have known about the sinkhole loss.

**Changes the Requirements for Professional Engineers and Professional Geologists**

In order to qualify as a professional engineer under the sinkhole statutes, a professional engineer must have successfully completed five or more courses in geotechnical engineering, structural engineering, soil mechanics, foundations, or geology. The bill deletes the requirement that the engineering degree include a specialty in geotechnical engineering. The bill also deletes the requirement that the geology degree include expertise in Florida geology.

**Alters Provisions Related to Catastrophic Ground Cover Collapse**

The bill amends the definition of catastrophic ground cover collapse to specify that the coverage only applies if there is structural damage to the *covered* building. The bill also deletes a reference to "structural damage" that the current statute implies can consist of "merely the settling or cracking of a foundation, structure, or building…."

Currently, when a policyholder chooses coverage only for catastrophic ground cover collapse, the insurer must give notice that sinkhole losses are not covered, but that sinkhole coverage can be purchased for an additional premium. Under the bill, insurers no longer must offer sinkhole coverage to policyholders. Accordingly, the notice to policyholders will no longer state that the insured may purchase sinkhole loss coverage for an addition premium.

**Nonrenewal of Policies That Include Sinkhole Coverage**

The bill allows an insurer to nonrenew a policy that provides sinkhole coverage and instead offer coverage that includes catastrophic ground cover collapse and excludes sinkhole coverage. The insurer is not required to provide the policyholder with the opportunity to purchase a sinkhole endorsement. The insurer may require an inspection of the property prior to issuing a sinkhole coverage endorsement. Currently the nonrenewal process detailed in this paragraph is limited to Pasco County and Hernando County and requires the insurer to make an offer of sinkhole coverage for an additional appropriate premium, subject to the underwriting or insurability guidelines of the insurer.

**Section 23** makes a technical change to s. 627.7061, F.S., substituting policyholder for insured.

**Section 24** repeals s. 627.7065, F.S., eliminating the database of information relating to sinkholes developed by the Department of Financial Services and the Department of Environmental Protection.

**Section 25** amends s. 627.707, F.S., containing the standards for the investigation of sinkhole claims by insurers, the payment of such claims, and the nonrenewal of policies covering sinkhole loss under specified circumstances. The bill substantially modifies the process for an insurer's investigation of a sinkhole claim.

**Investigation of Sinkhole Claims**

The bill creates a substantially new process for an insurer's investigation of a sinkhole claim. The process requires the insurer to determine whether: (1) the building has incurred structural damage that (2) has been caused by sinkhole activity. Coverage for sinkhole loss will not be available if structural damage is not present or sinkhole activity is not the cause of structural damage. The new process is as follows:

1) *Initial Inspection & Structural Damage Determination*: Upon receipt of a claim for sinkhole loss, the insurer must inspect the policyholder's premises to determine if there has been structural damage which may be the result of sinkhole activity. This inspection will often require the insurer to retain a professional engineer to evaluate whether the insured building has incurred structural damage as defined by statute.
2) *Sinkhole Testing Initiated by the Insurer*: The insurer is required to engage a professional engineer or professional geologist to conduct sinkhole testing pursuant to s. 627.7072, F.S., if the insurer confirms that structural damage exists and is either unable to identify a valid cause of the structural damage or discovers that the structural damage is consistent with sinkhole loss. If coverage is excluded under the policy even if sinkhole loss is confirmed, then the insurer is not required to conduct sinkhole testing. The bill deletes the requirement that the insurer conduct sinkhole testing upon the demand of the policyholder.
3) *Notice to the Policyholder*: The bill maintains the requirement that the insurer must provide written notice to the policyholder detailing what the insurer has determined to be the cause of damage (if the determination has been made) and a statement of the circumstances under which the insurer must conduct sinkhole testing. Notice of the right of the policyholder to demand sinkhole testing is deleted.

4) *Authorization to Deny Sinkhole Claim*: Insurers may continue to deny the claim upon a determination that there is no sinkhole loss.
5) *Policyholder Demand for Sinkhole Testing*: The bill specifies that the policyholder may demand sinkhole testing in writing within 60 days after receiving a claim denial if the insurer denies the claim for lack of sinkhole loss without performing sinkhole testing and if coverage would be available if a sinkhole loss is confirmed (i.e. the claim denial was not issued due to policy conditions or exclusions of coverage and instead was based the failure of the loss to meet the definition of sinkhole loss). However, if sinkhole testing certifies pursuant to s. 627.7073, F.S., that there is no sinkhole loss (structural damage caused by sinkhole activity), then the policyholder must pay the insurer up to 50 percent of the sinkhole testing costs up to the greater of the sinkhole deductible or $2,500.

6) *Payment of a Claim for Sinkhole Loss*: The insurer continues to be required to pay to stabilize the land and building and repair the foundation upon the verification of a sinkhole loss. The bill specifies that payment shall be made to conduct such repairs in accordance with the recommendations of the professional engineer retained by the insurer under s. 627.707(2), F.S. The bill also clarifies that the insurer is required to give notice to the policyholder regarding payment of the claim. Current law states that the claim payment must be made "in consultation with the policyholder," which has created disagreement between insurers and some policyholders whether the statute requires only notice to the policyholder or whether the insurer and policyholder must reach an agreement regarding the methods of sinkhole repairs to be used and their estimated costs.

**Payment of Sinkhole Loss Claims**

Under current law an insurer may limit payment to the actual cash value of the sinkhole loss not including below-ground repair techniques until the policyholder enters into a contract for the performance of building stabilization repairs. The bill requires the contract for below-ground repairs to be made in accordance with the recommendations set forth in the insurer's sinkhole report issued pursuant to 627.7073, F.S.. and entered into within 90 days after the policyholder receives notice that the insurer has confirmed coverage for sinkhole loss. The time period is tolled if either party invokes neutral evaluation. Stabilization and all other repairs to the structure and contents must be completed within 12 months after the policyholder enters into the contract for repairs unless the insurer and policyholder mutually agree otherwise, the claim is in neutral evaluation, the claim is in litigation, or the claim is under appraisal.

Under current law, the insurer may make payment directly to persons selected by the policyholder to perform land and building stabilization and foundation repairs if the policyholder and any lien holder grant written approval. The bill deletes the requirement of policyholder approval in order for the insurer to make direct payment to the persons performing repairs.

**Prohibition of Rebates for Sinkhole Repairs**

The bill prohibits a policyholder from accepting a rebate from a person performing sinkhole repairs. If the policyholder does receive a rebate, coverage under the insurance policy is rendered void and the policyholder must refund the amount of the rebate to the insurer. Furthermore, a policyholder that accepts a rebate or a person who offers a rebate commits insurance fraud punishable as a third degree felony as provided in s. 775.082, F.S. (up to five years imprisonment), s. 775.083, F.S. (up to a $5,000 fine), and s. 775.084, F.S. (for a habitual felony offender up to 10 years imprisonment with no eligibility for release for five years).

**Requirement to Pay Costs of Sinkhole Testing**

If the policyholder requests that the insurer conduct sinkhole testing and the sinkhole testing report certifies there is no sinkhole loss, the policyholder must reimburse 50 percent of the insurer's sinkhole testing costs up to the greater of the deductible or $2,500. The policyholder is not responsible for testing costs if sinkhole testing is initiated by the insurer (due to a determination that structural damage is present).

**Nonrenewal of Policies**

Current law allows the insurer to nonrenew a policy on the basis of a sinkhole loss claim if the insurer makes payments that exceed the current policy limit for property damage coverage. The bill instead provides that the policy may be nonrenewed if the payments equal or exceed the policy limit in effect on the date of loss to the covered building as set forth on the declarations page. However, the policy cannot be nonrenewed if the insured has repaired the structure in accordance with the engineering recommendations provided in the sinkhole report obtained by the insurer.

**Section 26** amends s. 627.7073, F.S., containing the statutory requirements regarding sinkhole testing reports.

**Sinkhole Testing Reports**

The bill alters the findings that must be contained within a certified sinkhole testing report, primarily to require the report to determine if structural damage is present that has been caused by sinkhole activity.

If the sinkhole report verifies the existence of a sinkhole loss, the bill requires the report to certify that structural damage to the covered building has been identified within a reasonable professional probability. The report must verify causation by certifying that the cause of structural damage is sinkhole activity. The report must also certify that the analyses were sufficient to identify sinkhole activity as the cause of structural damage. The bill maintains the requirement that the report provide recommendations for stabilizing the land and building and repairing the foundation.

In the event that a sinkhole loss is not verified, the report must state that there is no structural damage or that the cause of structural damage is not sinkhole activity within a reasonable professional probability. The report must also state the cause of structural damage when certifying that a sinkhole loss has not occurred.

**Presumption of Correctness**

Current law states that the findings, opinions, and recommendations contained in a statutorily compliant sinkhole testing report are presumed correct. The bill also states that the presumption of correctness shifts the burden of proof in court to the Plaintiff. The bill will reverse the holding of *Warfel v. Universal Ins. Co. of N.A.*, which found that the presumption of correctness does not shift the burden of proof. The bill specifies that the presumption of correctness only applies to a report prepared by the insurer's professional engineer with regard to land and building recommendations. The presumption of correctness is based upon public policy concerns regarding the affordability of sinkhole coverage, to provide consistency in claims handling, and to reduce the number of disputed sinkhole claims.

**Filing of Sinkhole-Related Reports with Clerk of Court**

The bill expands current law, which requires the insurer to file a sinkhole report with the county Clerk of Court when paying a claim for sinkhole loss. Insurers must also file a neutral evaluator's report that verifies a sinkhole loss, a copy of the certification that stabilization has been completed (if any), and the amount of the payment. The bill also requires the policyholder to file with the county Clerk of Court a copy of any sinkhole report regarding the insured property prepared at the request of the policyholder. Filing the policyholder's sinkhole report is a precondition to accepting payment for a sinkhole loss.

**Notice to Property Buyers of Sinkhole Claims**

The bill strengthens the requirement that sellers notify the buyers of real property of any sinkhole claims payments regarding the property and whether all proceeds were used to repair sinkhole damage. The bill requires the disclosure to be made before closing and to include the amount of the payment received. The seller must also provide to the buyer prior to closing the statutory sinkhole report, all other reports regarding the property, the neutral evaluation report, and the certification indicating that stabilization of the property is completed.

**Section 27** amends, s. 627.7074, F.S., which provides the procedure for the neutral evaluation of sinkhole claims administered through the Department of Financial Services (DFS). The bill specifies that neutral evaluation is available to either party if a sinkhole report has been issued pursuant to s. 627.7073, F.S. Currently, the statute does not state when neutral evaluation can be requested, which has resulted in requests for neutral evaluation before sinkhole testing has been conducted. In addition, the bill requires neutral evaluation to determine the following.

- Causation.
- All Methods of stabilization and repair both above and below ground.
- The costs for stabilization and all repairs.
- Information necessary to determine whether sinkhole loss has been verified, causation, and estimated repair costs.

The neutral evaluator's report must describe all matters that are the subject of the neutral evaluation, including the following.

- Whether sinkhole loss has been verified or eliminated within a reasonable degree of professional probability.
- Whether sinkhole activity caused structural damage to the building.
- If sinkhole loss is present, the estimated cost of stabilizing the land and covered structures and other appropriate remediation and necessary building repairs due to sinkhole loss.

**Availability of Appraisal**

Neutral evaluation does not invalidate an appraisal clause in an insurance policy, which either party may select to resolve a dispute regarding the amount of loss.

**Neutral Evaluator Access to Information**

The neutral evaluator must have reasonable access to the interior and exterior of insured structures that are the subject of a claim. The policyholder must provide the neutral evaluator with any reports initiated by the policyholder or the policyholder's agent that confirm sinkhole loss or dispute another sinkhole report.

**Criteria for Disqualification of a Neutral Evaluator**

The parties may disqualify up to two neutral evaluators proposed by the DFS without cause. The parties may also submit requests to disqualify evaluators for cause. The proposed neutral evaluator may only be disqualified for cause because of a specified familial relationship, a conflict of interest based on prior representation of either party or adverse to the parties' interests in a substantially related matter, or a prior employment relationship with either party. Under current law, each party may disqualify up to three proposed neutral evaluators for any reason, but there are no disqualifications for cause.

**Time-Frames for Conducting Neutral Evaluation**

The bill generally expands the time frames for conducting neutral evaluation. The parties are directed to agree to the appointment of a qualified neutral evaluator, but if they cannot do so within 14 days, the Department of Financial Services is directed to select the neutral evaluator. The neutral evaluator that is selected must notify the parties of the schedule for the neutral evaluation conference within 14 days of receiving the assignment. The neutral evaluator is directed to make reasonable efforts to hold the conference within 90 days after the DFS has received the neutral evaluation request, but failure to do so does not invalidate either party's right to neutral evaluation. The neutral evaluation report must be sent to all parties and the DFS within 14 days after completing the neutral evaluation conference. The mandatory stay of court proceedings pending completion of neutral evaluation is automatically lifted five days after the filing of the neutral evaluator's report with the court.

**Permits Additional Experts and Testing to Assist the Neutral Evaluator**

The neutral evaluator that lacks the training and credentials to provide an opinion regarding a disputed issue may enlist another professional neutral evaluator, a professional engineer or professional geologist, or a licensed building contractor who has the training and credentials to provide that opinion.

The neutral evaluator may also request the entity that performed the sinkhole investigation pursuant to s. 627.7072, F.S., perform additional and reasonable testing that is deemed necessary by the neutral evaluator.

**Admissibility of Neutral Evaluator's Testimony and Report**

The neutral evaluator's full report and testimony must be admitted in any action, litigation or proceeding giving rise to the claim or related to the claim. However, oral or written statements or nonverbal conduct other than those required to be admitted are confidential and may not be disclosed to a person other than a party to neutral evaluation or a party's counsel.

**Other Provisions**

The bill includes the following provisions.

- The actions of the insurer are not a confession of judgment or admission of liability if an insurer timely complies with the neutral evaluator's recommendations but the policyholder declines to resolve the matter in accordance with those recommendations.
- Payments shall be made pursuant to the insurance policy and s. 627.707(5), F.S., if the insurer agrees to comply with the neutral evaluator's report.
- Neutral evaluators are agents of the DFS and have immunity from suit.
- The DFS must adopt procedural rules for neutral evaluation.

**Section 28** amends s. 627.712(1), F.S., to provide conforming changes regarding the name change of the Citizens coastal account.

**Section 29** provides that act is generally effective July 1, 2011, except as otherwise expressly provided. This provision is effective June 1, 2011.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Consumers should benefit because the bill strengthens insurer solvency by increasing the minimum surplus requirements for "new" or "current" residential property insurers which increases the likelihood that insurers can pay policyholder claims and that fewer insurers will enter rehabilitation or liquidation proceedings. The bill also safeguards insurer solvency by permitting insurers to cancel or nonrenew insurance policies within 45 days if the OIR finds the early cancellations are necessary to protect the best interests of the policyholders and the public.

Insurance agents should benefit under this legislation because the OIR is precluded from directly or indirectly impeding or compromising an insurer's right to acquire policyholders, advertise, or appoint agents, including the amount of agent commissions during a rate filing procedure.

Revising the adjustment and holdback procedures for homeowners' insurance policies which offer replacement cost coverage should help ensure that policyholders make necessary repairs to their dwellings. The revisions should also discourage inflated estimates for personal property claims that are insured on a replacement basis.

The revisions to the statutes governing sinkhole coverage should reduce the number of sinkhole claims and disputes, ultimately reducing the losses associated with such claims. The reforms should reduce premium costs for policyholders purchasing residential property insurance and increase the availability of coverage within the private market. However, claim costs associated with sinkhole loss may increase in the short term with the passage of this bill, as a number of policyholders may file sinkhole damage claims alleging damage that occurred before the effective date of the reforms contained in this bill.

Insurers no longer must offer sinkhole coverage for an additional premium. Also, commercial property insurance will no longer contain catastrophic ground cover collapse or sinkhole coverage. This likely will reduce the availability of sinkhole coverage from the private market or Citizens Property Insurance Corporation. Representatives from the Florida Surplus Lines Service Office indicated to committee staff that sinkhole coverage is not generally available from the surplus lines market at the present time.

The bill requires the Florida Hurricane Catastrophe Fund to provide reimbursement for fees (such as attorney's fees) paid on behalf of the policyholder and requires reimbursement for all incurred losses, with exceptions. To the extent this results in additional monies paid by the FHCF, it could increase the likelihood that the fund will have to issue revenue bonds. If the fund does not provide reimbursement for fees, it may incentivize insurance carriers to pay claims prior to the Plaintiff retaining an attorney.

C. Government Sector Impact:

Citizens Property Insurance Corporation is sustaining large losses related to sinkhole losses that are far greater than the sinkhole premium that Citizens is permitted to accept. The reforms to the sinkhole coverage insurance market in the bill are designed to reduce the costs associated with sinkhole claims.

Eliminating the database of information relating to sinkholes developed by the Department of Financial Services and the Department of Environmental Protection will remove all costs associated with its maintenance.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS/CS by Budget Subcommittee on General Government Appropriations on March 11, 2011**
The committee substitute makes the following substantial changes:

- Requires that all windstorm and hurricane property insurance claims be made within three years of the actual occurrence.
- Reinstates current language related to the collection of assessments that was inadvertently deleted (technical).
- Deletes the provision which specifies that the certification of a rate filing is not rendered false if the insurer provides additional or supplementary information requested by the Office of Insurance Regulation and reinstates current law.
- Deregulates sinkhole insurance rates with the goal of restoring a competitive market for sinkhole insurance in Florida.

**CS by Banking and Insurance on February 22, 2011**
The Committee Substitute makes the following substantial changes:

- Requires the Florida Hurricane Catastrophe Fund to provide reimbursement for all incurred losses, including fees, with exceptions.
- Deletes the requirement that the Insurance Consumer Advocate issue yearly report cards for personal residential property insurers.
- Deletes the requirement to reduce the Citizens high-risk area that is eligible to purchase wind-only coverage from Citizens.
- Reduces to 90 days the written notice of nonrenewal, cancellation, or termination for personal or residential property insurance policies.
- Creates requirements for the payment of a loss to a dwelling or personal property insured on a replacement cost basis. The insurer must pay the actual cash value of the loss. Payment for the replacement cost is available once the insured has contracted to perform dwelling repairs or has provided a receipt to the insurer for the purchase of personal property financed by the payment of insurance proceeds.
- Specifies that if an insurer cancels a policy providing sinkhole coverage and instead offers a policy that provides catastrophic ground cover collapse, the insurer is not required to offer a sinkhole coverage endorsement.

- Requires a policyholder to refund to the insurer the amount of a refund accepted from any person performing sinkhole repairs and voids coverage.
- Specifies that a policyholder is liable for part of the cost of sinkhole testing conducted by the insurer if the policyholder requested the testing and a sinkhole loss is not verified.

B. Amendments:

**Barcode 749848 by Budget on March 15, 2011:**
The amendment requires an insurer to obtain the prior approval of the Office of Insurance Regulation (OIR) before implementing a rate increase for property insurance (the "file and use" method). Current law permits the insurer to use the "file and use" method or the "use and file method," in which the insurer implements the rate increase and then seeks OIR approval no later than 30 days of the effective date of the new rate. Insurers that make a "use and file" rate filing must return any premium that the OIR finds excessive.
(WITH TITLE AMENDMENT)

**Barcode 901222 by Budget on March 22, 2011:**
The amendment reinstates current law requiring the insurer to pay the full replacement cost of a loss to real or personal property insured on a replacement cost basis without reservation or holdback of any depreciation, whether or not the insured replaces or repairs the dwelling or property.
(WITH TITLE AMENDMENT)

901222

LEGISLATIVE ACTION

| Senate | . | House |
|---|---|---|
| Comm: FAV | . | |
| 03/22/2011 | . | |
| | . | |
| | . | |
| | . | |

The Committee on Budget (Fasano) recommended the following:

**Senate Amendment (with title amendment)**

Delete lines 2567 - 2596
and insert:
(3) In the event of a loss for which a dwelling or personal property is insured on the basis of replacement costs, the insurer shall pay the replacement cost without reservation or holdback of any depreciation in value, whether or not the insured replaces or repairs the dwelling or property.

========== T I T L E A M E N D M E N T ==========
And the title is amended as follows:

Delete lines 149 - 160

and insert:

less any applicable deductible;

749848

LEGISLATIVE ACTION

| Senate | . | House |
|---|---|---|
| Comm: FAV | . | |
| 03/22/2011 | . | |
| | . | |
| | . | |
| | . | |

The Committee on Budget (Fasano) recommended the following:

**Senate Amendment (with title amendment)**

Delete lines 713 - 753
and insert:
(2) As to all such classes of insurance:
(a) Insurers or rating organizations shall establish and use rates, rating schedules, or rating manuals that ~~to~~ allow the insurer a reasonable rate of return on the ~~such~~ classes of insurance written in this state. A copy of rates, rating schedules, rating manuals, premium credits or discount schedules, and surcharge schedules, and changes thereto, must ~~shall~~ be filed with the office under one of the following procedures except as provided in subparagraph 3.:

749848

1. If the filing is made at least 90 days before the proposed effective date and ~~the filing~~ is not implemented during the office's review of the filing and any proceeding and judicial review, ~~then~~ such filing is ~~shall be~~ considered a "file and use" filing. In such case, the office shall finalize its review by issuance of an approval ~~a notice of intent to approve~~ or a notice of intent to disapprove within 90 days after receipt of the filing. The approval ~~notice of intent to approve~~ and the notice of intent to disapprove constitute agency action for purposes of the Administrative Procedure Act. Requests for supporting information, requests for mathematical or mechanical corrections, or notification to the insurer by the office of its preliminary findings does ~~shall~~ not toll the 90-day period during any such proceedings and subsequent judicial review. The rate shall be deemed approved if the office does not issue an approval ~~a notice of intent to approve~~ or a notice of intent to disapprove within 90 days after receipt of the filing.

2. If the filing is not made in accordance with ~~the provisions of~~ subparagraph 1., such filing must ~~shall~~ be made as soon as practicable, but within ~~no later than~~ 30 days after the effective date, and is ~~shall be~~ considered a "use and file" filing. An insurer making a "use and file" filing is potentially subject to an order by the office to return to policyholders those portions of rates found to be excessive, as provided in paragraph (h).

3. For all property insurance filings ~~made or submitted after January 25, 2007, but before December 31, 2010~~, an insurer seeking a rate that is greater than the rate most recently approved by the office shall make a "file and use" filing. For

749848

purposes of this subparagraph, motor vehicle collision and comprehensive coverages are not considered to be property coverages.

========== T I T L E A M E N D M E N T ==========

And the title is amended as follows:

Delete lines 77 - 78

and insert:

discriminatory factors; requiring all insurers seeking a certain rate to make a "file and use" filing; prohibiting the Office of Insurance

**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.)

Prepared By: The Professional Staff of the Rules Committee

| | |
|---|---|
| BILL: | CS/SB 378 |
| INTRODUCER: | Rules Subcommittee on Ethics and Elections and Senator Gaetz |
| SUBJECT: | Federal Write-In Absentee Ballot |
| DATE: | March 31, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Fox | Roberts | EE | **Fav/CS** |
| 2. | Fox | Phelps | RC | **Pre-meeting** |
| 3. | | | BC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## Please see Section VIII. for Additional Information:

| | | |
|---|---|---|
| A. COMMITTEE SUBSTITUTE..... | X | Statement of Substantial Changes |
| B. AMENDMENTS..... | | Technical amendments were recommended |
| | | Amendments were recommended |
| | | Significant amendments were recommended |

## I. Summary:

Committee Substitute for Senate Bill 378 allows absent uniformed services or overseas electors to use the federal write-in absentee ballot (FWAB) in any federal, state, or local election involving two or more candidates. The bill maintains that the FWAB may only be used by eligible electors as a last resort, that is, when the elector has timely requested but has not received an official state absentee ballot. The bill adopts specific procedures to duplicate an FWAB when canvassed, similar to when an absentee ballot is duplicated when received physically damaged. It allows the voter to designate candidate choices by name or political party preference for each office. It requires the Department of State to adopt rules to determine voter intent on an FWAB. Finally, the bill requires that all races on each FWAB received by a county supervisor of elections by 7 p.m. on election day be canvassed, unless an elector's official absentee ballot is received by that time — in which case the official absentee ballot is counted in lieu of the FWAB.

This bill substantially amends and reenacts ss. 101.5614, 101.6952, 102.166 and 104.18 of the Florida Statutes.

## II. Present Situation:

Currently, there are three different *general* election ballots that an absent uniformed services or overseas Florida voter can use for various federal, state, and local elections: the state write-in ballot, the official absentee ballot, and the federal write-in absentee ballot. The official absentee ballot is the only one that an elector can use in a *primary* election.

BALLOTS

***Official Florida Absentee Ballot***

An absent uniformed services or overseas voter who requests[1] an ***official Florida write-in absentee ballot*** may vote in any federal, state, or local primary election or general election — including multi-candidate races, judicial retention elections, and state constitutional amendment/local referendum elections. The form of the ballot is the familiar one that voters going to the polls or voting early receive. It contains the name of offices, candidate names, political party abbreviations, and either a bubble or arrow to be filled-in by the voter to designate choices. This is by far the most commonly-used ballot.

***Federal Write-In Absentee Ballot (FWAB)***

Federal law provides that an absent uniformed services or overseas voter who timely requests but does not receive an official state absentee ballot may use the ***federal write-in absentee ballot (FWAB)*** to vote for *candidates* in *federal general* elections only.[2] Electors may fill in either the candidate's name or the name of a political party under headings designated as:

- PRESIDENT/VICE PRESIDENT
- U.S. SENATOR
- U.S. REPRESENTATIVE/DELEGATE/RESIDENT COMMISSIONER

Absent specific state authorization, the FWAB may not be used for state or local elections. Other southern states, including Arkansas, Mississippi, South Carolina, Tennessee, and neighboring Georgia,[3] have authorized the use of the FWAB in certain state and local elections: Florida has not. While most military and overseas Florida voters utilize either the official absentee ballot or the state write-in absentee ballot, eligible electors have used the FWABs as a ballot of last resort in recent elections.[4]

[1] Pursuant to 101.62, F.S.
[2] 42 U.S.C. § 1973ff-2.
[3] O.C.G.A. § 21-2-381.1 (2010).
[4] FWABs have been received in recent elections in military-rich Escambia and Okaloosa Counties. Escambia County received 34 FWABs in the 2010 general election. Okaloosa County received 162 FWABs in 2008 and 101 FWABs in 2010. Regarding the 2010 FWABs received by Okaloosa County, 63 of the 101 were not counted because their official absentee ballot arrived after (or in some cases before) the FWAB was received. E-mail from Nanci Watkins, Executive Assistant to the Florida State Association of Supervisors of Elections to John Seay, Legislative Intern, Rules Subcommittee on Ethics & Elections (Mar. 3, 2011).

Electors use the FWAB "ADDENDUM" to designate choices in state and local candidate races. The elector must write-in the name of each office for which he or she wishes to vote, along with the corresponding candidate's name or political party preference for the office. The form of the addendum is essentially as follows:

**ADDENDUM**

Some states allow the Federal Write-In Absentee Ballot to be used by military and overseas civilian voters in elections other than general elections or for offices other than Federal offices. Consult your state section in the *Voting Assistance Guide* to determine your state's policy. *If you are eligible to use this ballot to vote for offices/candidates other than those listed above*, please indicate in the spaces provided below, the office for which you wish to vote (for example: Governor, Attorney General, Mayor, State Senator, etc.) and the name and/or party affiliation of the candidate for whom you wish to vote.

| **OFFICE** | **CANDIDATE'S NAME or PARTY AFFILIATION** |
|---|---|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

***State Write-In Absentee Ballot***

An overseas voter who states that, due to military or other contingencies that preclude normal mail delivery, he or she cannot vote an absentee ballot during the normal absentee voting period may request a ***"state write-in absentee ballot"*** not earlier than 180 days before a general election.[5] The state write-in absentee ballot *may not* be used in a primary election. The state write-in ballot contains all *offices* --- federal, state, and local --- for which the elector would otherwise be entitled to vote, including judicial retention elections; the elector, however, *cannot* use the ballot to vote in state constitutional amendment or local referendum elections.

The form of the state write-in absentee ballot includes the printed name of the office to be voted, along with a corresponding line for the elector to designate a candidate's name or political party preference for that office.[6] The judicial retention questions are also printed on the form, including the names of the appellate justices or judges scheduled to be on the ballot for retention.

[5] Section 101.6952(1), F.S.
[6] *See* Rule 1S-2.028, FLA. ADMIN. CODE (detailing the form of the state write-in absentee ballot).

BACKGROUND

***Military/Overseas Voting in Florida Elections***

Florida has had a somewhat troubled past with respect to accommodating military and overseas voters, due primarily to the existence of the historical second primary election — which hindered the timely delivery of absentee ballots to overseas voters. The existence of the second primary meant that Florida had to conduct three elections in a 9-week period, with the first primary being held nine weeks prior to the general election and the second primary (or "runoff") held five weeks prior to the general election.[7] Many of these problems, however, have been overcome by: eliminating the second primary;[8] mandating that official absentee ballots be provided to uniformed services and overseas voters at least 45 days before each primary and general election where requests have been received; and, providing for the electronic (e-mail) delivery of unvoted ballots, as mandated by the federal Military and Overseas Voter Empowerment (MOVE) Act.

The former election schedule prompted the federal government to sue the State of Florida in the early 1980's. The suit alleged that Florida's system of conducting three elections in nine weeks disenfranchised military and overseas voters by not providing sufficient time for supervisors of elections to prepare absentee ballots, mail them to overseas voters, and have the voters return them by election day. To resolve the suit, Florida entered into a consent decree with the federal government, which ultimately required the State to count votes from such electors in the presidential preference primary and federal general election contests that are received up to 10 days after the date of the election.[9] Florida is still bound by the terms of this consent decree, having never sought relief from the courts.

In 1989, the Legislature attempted to further accommodate absentee voting by military and overseas electors by adopting an advance ballot system.[10] Under the advance ballot system, supervisors of elections mailed first primary absentee ballots to qualified overseas electors no later than 35 days before the primary.[11] Subsequently, the supervisors would mail *advance* ballots for the second primary and general election if the regular absentee ballots for the second primary and general election were not available 45 days before the respective elections.[12] Advance ballots for the second primary and general election could necessarily contain candidates who may have been eliminated in the prior election. In 2005, the Legislature permanently ended the second primary system but did not change the number of days in advance to send absentee ballots.[13] Beginning in 2010, supervisors of elections were required to mail absentee ballots to absent uniformed services and overseas electors no later than 45 days before each election.[14] The

[7] Section 100.091, F.S. (2000).
[8] The year 2000 was the last time Florida conducted a second primary. The second primary was suspended for the 2002 and 2004 election cycles, and permanently eliminated prior to the 2006 cycle.
[9] Rule 1S-2.013, FLA. ADMIN. CODE.
[10] Section 28, ch. 89-338, LAWS OF FLA.
[11] *Id.*
[12] *Id.*
[13] In 2005, the ballot schedule was revised to require supervisors of elections to mail absentee ballots to overseas voters no later than 35 days before the primary or general election. Section 16, ch. 2005-286, LAWS OF FLA. In 2007, the Legislature again revised the ballot schedule to require absentee ballots to overseas voters to be mailed no later than 35 days prior to a primary election and no later than 45 days prior to a general election. Section 30, ch. 2007-30, LAWS OF FLA.
[14] Section 101.62(4)(a), F.S. *See also* Section 7, ch. 2010-167, LAWS OF FLA.

45-day period currently required under Florida law is in compliance with the federal Military and Overseas Voter Empowerment (MOVE) Act.[15]

On a related note, there were numerous legal challenges to the validity of overseas military ballots in Florida during the 2000 presidential election.[16] In response, the 2001 Legislature created the state write-in absentee ballot system. Overseas voters who anticipate that they will not be able to vote an absentee ballot during the regular absentee ballot voting period may request a state write-in absentee ballot. A date line was also added to the absentee ballot return envelope, and a presumption was created in law that absentee ballots received from overseas electors were mailed on the date stated on the envelope — regardless of the absence of a postmark or a postmark which is dated later than the date of election.[17]

***Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)***

In 1986, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[18] The Act created an emergency back-up ballot, the Federal Write-In Absentee Ballot (FWAB), which can be cast by voters who make timely application for but do not receive an official absentee ballot.[19] The Act covers citizens who are members of the Armed Forces and Merchant Marine, and their spouses and dependents, and citizens residing outside of the United States. Members of the Armed Forces and Merchant Marine and their spouses and dependents are allowed to vote absentee while away from their place of voting residence, wherever stationed, either within or outside the United States. Other U.S. citizens residing outside of the United States and its territories may vote in the state where they last resided prior to leaving the United States.

In addition, UOCAVA requires states to accept and canvass an FWAB from military and overseas voters under certain conditions. The voter:

- Must be absent from his or her voter residence;
- Must have applied for a regular ballot early enough so the request is received by the appropriate local election official not later than the state deadline;[20] and,
- Must not have received the requested regular absentee ballot from the State.

UOCAVA also allows overseas electors who have submitted an FWAB and later receive an official absentee ballot to submit the official absentee ballot.[21] The FWAB is also required to

[15] The MOVE Act requires ballots for uniformed services and overseas citizen voters be sent at least 45 days prior to a general election for federal office. Pub. L. 111-84; 42 U.S.C. § 1971.
[16] *See e.g., Congress Muzzling the Military,* FLORIDA TIMES-UNION, Dec. 13, 2000, at B6. Many of the challenges of the ballot validity stemmed from the fact that many ballots lacked a postmark. Florida law required that ballots mailed by absent qualified electors overseas were considered valid *only* if the ballot were mailed with an APO, FPO, or foreign postmark. *See also Bush v. Hillsborough County Canvassing Bd.,* 123 F.Supp.2d 1305 (N.D. Fla. 2000).
[17] Section 101.6952(2), F.S.
[18] Pub. L. 99-410.
[19] 42 U.S.C. § 1973ff-2.
[20] Florida law provides that the supervisor must receive a request for an absentee ballot by 5 p.m. on the 6th day before an election. Section 101.62(2), F.S. While this used to be an impracticable deadline for overseas voters given mailing delays, the newly-authorized electronic transmission of unvoted absentee ballots makes this deadline applicable to absent military and overseas voters.

clearly state that an overseas elector who submits an FWAB and later receives and submits an absentee ballot must make every reasonable effort to inform the appropriate election official that the elector has submitted more than one ballot.[22]

## III. Effect of Proposed Changes:

The CS expands use of the FWAB by absent uniformed services and overseas voters to state and local elections involving two or more candidates.

Specifically, the CS:

- Authorizes an eligible elector to use the FWAB to cast a vote in any state or local election involving two or more candidates.[23]
- Authorizes an eligible elector to use the FWAB *only* as a ballot of last resort under the same limitations as apply in federal races; an elector must have made timely application for an official state absentee ballot and not received it.
- Allows the elector to designate a candidate choice by writing the candidate's name or, in many elections,[24] the name of a political party.
- Clarifies that, in many cases, a candidate designation of "Independent" shall be ascribed to the candidate in the race who has registered to run with no party affiliation (NPA), provided there is only one such candidate.
- Requires supervisors to canvass all races on each FWAB received by 7:00 p.m. on election day, unless the supervisor has also received an official absentee ballot from an elector to substitute for the FWAB by that time — in which case the FWAB shall be invalid and the official absentee ballot is canvassed.
- Establishes specific procedures for duplicating an FWAB to be canvassed, mirroring the current procedures for duplicating a ripped, torn, or otherwise damaged official absentee ballot that cannot be processed by the voting equipment.
- Requires the Department of State to adopt specific rules to prescribe what constitutes a "clear indication on the ballot that the voter has made a definite choice" on the FWAB, such that local canvassing boards will use the same rules for duplicating ballots at the front-end of the canvassing process as will be used later in the case of a manual recount. The rules must be consistent with other ballots for certified voting systems, to the extent practicable. The rules must include, but are not limited to, addressing the following issues: opposing candidates who have the same or similar names; the use of marks, symbols, or language to indicate that the same political party designation applies to all listed offices; designating a qualified candidate for the wrong office; and, the appropriate lines or spaces for designating a candidate choice.
- Mirrors UOCAVA's provision allowing an elector who submits an FWAB and later receives an official absentee ballot to also submit the official absentee ballot, and

[21] 42 U.S.C. § 1973ff-2(d).
[22] *Id.*
[23] The FWAB is not designed to accommodate choices in issue elections such as constitutional amendments and referendums or judicial retention elections, both of which are foreign to the federal electoral system.
[24] Excludes primary, special primary, and nonpartisan elections.

encourages the elector to make every reasonable effort to inform the appropriate supervisor of elections that they have submitted more than one ballot.
- Removes criminal penalties for electors who have cast more than one ballot in an election in the limited circumstance of an elector who has submitted an FWAB and later received and submitted an official absentee ballot, to conform.
- Provides an effective date of July 1, 2011.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. 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 Subcommittee on Ethics and Elections on March 7, 2011:**
The CS fleshes out and incorporates into Florida's electoral voting scheme the concept found in the original bill — expanding the use of the Federal Write-In Absentee Ballot to state and local races. Specifically, the CS differs from the original bill in that it: authorizes using FWABs for state and local candidate races (no issue or retention elections); limits FWAB use as a ballot of last resort, as under federal law; requires supervisors of elections to canvass all FWABs in their possession by 7 p.m. on election day, unless an elector's official absentee ballot has been received by that time; adopts specific procedures to duplicate an FWAB when canvassed; requires the Department of State to adopt rules to determine voter intent on an FWAB; encourages electors who have submitted an FWAB and later receive and submit an official absentee ballot to make every reasonable effort to inform the appropriate supervisor of elections that they have submitted more than one ballot; and, removes criminal penalties for casting more than one ballot under such circumstances, to conform.

B. Amendments:

None.

**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.)

Prepared By: The Professional Staff of the Rules Committee

| | |
|---|---|
| BILL: | CS/SB 426 |
| INTRODUCER: | Judiciary Committee and Senator Latvalla |
| SUBJECT: | Service of Process |
| DATE: | April 1, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Treadwell | Maclure | JU | **Fav/CS** |
| 2. | Wolfgang | Yeatman | CA | **Favorable** |
| 3. | Wolfgang | Phelps | RC | **Pre-meeting** |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## Please see Section VIII. for Additional Information:

| | | |
|---|---|---|
| A. COMMITTEE SUBSTITUTE..... | X | Statement of Substantial Changes |
| B. AMENDMENTS..... | | Technical amendments were recommended |
| | | Amendments were recommended |
| | | Significant amendments were recommended |

## I. Summary:

The bill authorizes certified process servers to serve writs of possession in actions for possession of residential property. More specifically, upon the entry of a judgment in favor of a landlord in a possession action and issuance of the writ by the clerk of court, the landlord may elect to use a certified process server to serve the writ rather than the sheriff.

After the posting of a writ by the certified process server, he or she must, within 12 hours, provide written notice to the sheriff including the date and time the writ was posted on the premises.

This bill substantially amends the following sections of the Florida Statutes: 48.021, 48.27, and 83.62.

## II. Present Situation:

### Florida Residential Landlord and Tenant Act

Part II of chapter 83, F.S., titled the "Florida Residential Landlord and Tenant Act" (act), governs the relationship between landlords and tenants under a residential lease agreement.[1] A rental agreement includes any written or oral agreement regarding the duration and conditions of a tenant's occupation of a dwelling unit.[2] The provisions of this act specifically address the payment of rent,[3] duration of leases,[4] security deposits,[5] landlord maintenance obligations,[6] termination of rental agreements,[7] and landlord remedies.[8]

### Landlord Remedies for Breach of Lease

Current law provides the landlord with choices of remedies for breaches of the rental agreement by the tenant.[9] The remedies provided in statute apply to the following situations:

- The tenant has breached the lease for the dwelling unit and the landlord has obtained a writ of possession;
- The tenant has surrendered possession of the dwelling unit to the landlord; or
- The tenant has abandoned the dwelling unit.

The statute permits the landlord to:

- Treat the lease as terminated and retake possession for his or her own account, thereby terminating any further liability of the tenant; or
- Retake possession of the dwelling unit for the account of the tenant, holding the tenant liable for the difference between rent stipulated to be paid under the lease agreement and what, in good faith, the landlord is able to recover from a reletting; or
- Stand by and do nothing, holding the lessee liable for the rent as it comes due.[10]

### Right of Action for Possession

A landlord may recover possession of a dwelling unit if the tenant does not vacate the premises after the rental agreement is terminated.[11] However, under current law, a landlord is not authorized to recover possession except under the following circumstances:

---

[1] Part II of ch. 83, F.S.
[2] Section 83.43(7), F.S. (A rental agreement "means any written agreement, … or oral agreement for a duration of less than 1 year, providing for use and occupancy of premises.")
[3] Section 83.46, F.S.
[4] *Id.*
[5] Section 83.49, F.S.
[6] Section 83.51, F.S.
[7] *See* ss. 83.56 and 83.575, F.S.
[8] *See* ss. 83.58 and 83.595, F.S.
[9] Section 83.595, F.S.
[10] *Id.*
[11] Section 83.59(1), F. S.

- In an action for possession, in which the landlord, the landlord's attorney, or agent files a specified complaint alleging certain facts authorizing recovery in the proper county court where the dwelling unit is located;[12]
- In other civil actions in which right of possession is to be determined;
- Possession of the dwelling unit has been surrendered by the tenant to the landlord;
- The dwelling unit has been abandoned by the tenant; or
- The only remaining tenant in the dwelling unit has been deceased for at least 60 days with his or her personal property still remaining on the premises and rent remains unpaid, and the landlord has not received notice of a probate estate or personal representative thereof.[13]

**Writs of Possession**

After judgment is awarded in favor of the landlord in an action for possession of the property, the clerk must issue a writ of possession to the sheriff describing the premises and commanding the sheriff to put the landlord in possession after 24 hours' notice conspicuously posted on the premises.[14] After the 24-hour period elapses from the posting of the writ, the landlord or the landlord's agent may remove any personal property found on the premises.[15] The landlord may request that the sheriff stand by to keep the peace while the landlord changes the locks and removes the personal property from the premises.[16] Neither the sheriff nor the landlord is liable to the tenant or any other party for the loss, destruction, or damage to the property after it has been removed.[17]

**Overview of Service of Process**

Service of process is the formal delivery of a writ, summons, or other legal process or notice.[18] As a general rule, "statutes governing service of process are to be strictly construed to insure that a defendant receives notice of the proceedings."[19] Currently, under Florida law process may be served by a sheriff, a person appointed by the sheriff in the sheriff's county ("special process server"), or a certified process server appointed by the chief judge of the circuit court.[20] All process must be served by the sheriff of the county where the person to be served is found, except initial nonenforceable civil process, criminal witness subpoenas, and criminal summonses, which may be served by a special or certified process server.[21] Any person

[12] Section 83.59(2), F.S.
[13] Section 83.59(3), F.S.
[14] Section 83.62(1), F.S.
[15] Section 83.62(2), F.S.
[16] *Id.*
[17] *Id.*
[18] "The term 'process' is not limited to 'summons.' In its broadest sense [,] it is equivalent to, or synonymous with, 'procedure,' or 'proceeding.'" BLACK'S LAW DICTIONARY (9th ed. 2009). Thus, service of process may trigger the constitutional issue of procedural due process, which requires notice and the opportunity to be heard. *See, e.g., Minda v. Ponce*, 918 So. 2d 417, 422 (Fla. 2d DCA 2006) (citing *Schnicke v. Schnicke*, 533 So. 2d 337, 337-38 (Fla. 5th DCA 1988)).
[19] *Abbate v. Provident Nat'l Bank*, 631 So. 2d 312, 313 (Fla. 5th DCA 1994) (citing *Henzel v. Noel*, 598 So. 2d 220, 221 (Fla. 5th DCA 1992)).
[20] *Id.*
[21] Section 48.021(1), F.S. Service of process may be categorized as enforceable or nonenforceable. *See* Florida Senate, Committee on Justice Appropriations, *Sheriff Costs – Service of Process*, Interim Project Report 2006-144, at 1 (Aug. 2005).

authorized by the Florida Rules of Procedure may also serve civil witness subpoenas.[22] However, at present, there is no statutory authority or rule of procedure that allows anyone other than a sheriff or a sheriff's deputy to serve writs of possession in actions for possession of real property.

**Certified Process Servers**

A certified process server must be appointed by the chief judge of the judicial circuit in which he or she shall be allowed to serve process.[23] The chief judge of each circuit has discretion as to whether or not to appoint certified process servers. According to s. 48.29(3), F.S., a person applying with the chief judge to become a certified process server must:

- Be at least 18 years of age;
- Have no mental or legal disability;
- Be a permanent resident of the state;
- Submit to a background investigation;
- Certify that he or she has no pending criminal case, no record of any felony conviction, nor a record of conviction of a misdemeanor involving moral turpitude of dishonesty within the past 5 years;
- If prescribed by the chief judge of the circuit, submit to an examination testing his or her knowledge of the laws and rules regarding the service of process;
- Execute a bond in the amount of $5,000, which shall be renewable annually, for the benefit of any person injured by any malfeasance, misfeasance, neglect of duty, or incompetence of the applicant, in connection with his or her duties as a process server; and
- Take an oath that he or she will honestly, diligently, and faithfully exercise the duties of a certified process server.[24]

Once the process server is certified, he or she may serve nonenforceable civil process, as well as criminal witness subpoenas and criminal summonses, on a person found within the circuit where the server is certified.[25] Florida law does not provide a fee schedule establishing the fees allowed to be charged by certified process servers. Rather, current law generally provides that a "certified process server may charge a fee for his or her services."[26]

**Fees and Costs Associated with Writs of Possession**

Under Florida law, county sheriffs of the state must charge fixed, nonrefundable fees for the service of process in civil actions as established by a statutory schedule.[27] All fees collected under the statutory provisions for sheriffs' fees for service of process are to be paid monthly into

"Enforceable service of process involves a court order requiring the sheriff to take action (i.e., eviction, seizure of property)." *Id*. On the other hand, "[n]onenforceable service of process is designed to place another party on notice that he or she must take action (i.e., summons to appear, witness subpoena)." *Id*.

[22] Section 48.021(1), F.S. Rule 1.070, Florida Rules of Civil Procedure, provides that service of process may be made by a person appointed by court order, known as an elisor.

[23] Section 48.27, F.S.

[24] Section 48.29(3), F.S.

[25] Section 48.27(2), F.S.

[26] Section 48.29(8), F.S.

[27] Section 30.231(1), F.S.

the county's fine and forfeiture fund.[28] Current law provides that the sheriff's office may charge $40 for docketing and indexing each writ of execution, regardless of the number of persons involved, and $50 for each levy.[29] In addition to these fees, the sheriff is authorized to charge a reasonable hourly rate, and the person requesting the sheriff to stand by to keep the peace in an action for possession of property is responsible for paying the hourly rate.[30]

## III. Effect of Proposed Changes:

The bill authorizes certified process servers to serve writs of possession in actions for possession of real property. Currently, there is no statute or rule that allows anyone other than a sheriff or deputy to serve writs of possession in possession actions. The bill specifies that, upon the entry of a judgment in favor of a landlord in an eviction action and issuance of the writ by the clerk of court, the landlord may elect to use a certified process server to serve the writ.

The bill also makes conforming changes in the Florida Residential Landlord and Tenant Act (specifically s. 83.62, F.S.) and the general service of process statute (s. 48.021, F.S.) to authorize service of the writ of possession by a certified process server. The bill retains a sheriff's authority to serve a writ of possession in an eviction action.

Under current statute and practice, the clerk issues the writ of possession to the sheriff, and the sheriff serves the writ by conspicuously posting the writ on the premises. After 24 hours have passed from the posting of the writ, the landlord may take possession of the property with the sheriff standing by to keep the peace.[31] Under the bill, if the landlord elects to use a certified process server to serve the writ, the sheriff will remain under the obligation to stand by to keep the peace after the 24-hour period has passed. To aid in this process, the bill provides that upon the posting of the writ by the certified process server, he or she, within 12 hours, must provide written notice to the sheriff including the date and time the writ was posted on the premises.

**Other Potential Implications**:

It is the long-standing practice of Florida that enforceable civil process is served by the sheriff. Allowing a certified process server to serve the writ of possession is a significant departure from this practice.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

Section 18(b), Art. VII, State Constitution, provides that except upon approval by two-thirds of the members of each house, the Legislature may not enact, amend, or repeal any general law if the anticipated effect of doing so would reduce the authority that municipalities or counties have to raise revenues in the aggregate, as such authority exists

[28] Section 30.231(5), F.S.
[29] Section 30.231(1)(d), F.S. A levy is considered made when any property or any portion of the property listed or unlisted in the instructions for levy is seized, or upon demand of the sheriff the writ is satisfied by the defendant in lieu of seizure.
[30] Section 83.62(2), F.S.
[31] Section 83.62, F.S.

on February 1, 1989. Because sheriffs retain the authority to serve writs of possession under the bill, it does not appear that the authority of the local government to raise revenues has been affected by the provisions of the bill.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

In counties experiencing high volumes of cases involving possession of real property, landlords who elect to use a certified process server to deliver the writ of possession may experience a reduction in the amount of time that elapses between court approval of the writ and the actual service of the writ. Dependent upon the actual fee charged by certified process servers for serving the writ of possession, landlords could experience higher costs associated with the execution of the writ if they elect to use a certified process server.

C. Government Sector Impact:

The bill will allow landlords in successful eviction actions to elect to use certified process servers rather than the sheriff's office to serve writs of possession. All fees collected under the statutory provisions for sheriffs' fees for service of process are paid monthly into the county's fine and forfeiture fund. County revenues could be decreased contingent upon the number of landlords who elect to use certified process servers rather than the sheriff to serve the writs. However, sheriffs will continue to receive fees for assisting with repossession of the property 24 hours after the posting of the writ.

Clerks of court may experience some expense associated with revisions to the writ of possession form if changes are necessary as a result of allowing certified process servers to serve the writ.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Judiciary on February 8, 2011:**
The committee substitute:

- Specifies that a writ of possession may be served by a certified process server in s. 48.021, F.S. (the general service of process statute), for consistency with the bill's grant of authority to certified process servers in s. 48.27, F.S.;
- Substitutes the term "landlord" for the term "person" to make clear that the landlord selects the certified process server; and
- Requires a certified process server, within 12 hours of the posting of the writ, to provide written notice to the sheriff including the date and time the writ was posted on the premises.

B. Amendments:

None.

**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.)

Prepared By: The Professional Staff of the Rules Committee

| | |
|---|---|
| BILL: | SB 420 |
| INTRODUCER: | Health Regulation Committee |
| SUBJECT: | OGSR/Florida Center for Brain Tumor Research |
| DATE: | April 1, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | O'Callaghan | Stovall | HR | **Favorable** |
| 2. | Naf | Roberts | GO | **Favorable** |
| 3. | Naf | Phelps | RC | **Pre-meeting** |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

This bill is the result of an Open Government Sunset Review of the public records exemptions for the Florida Center for Brain Tumor Research (FCBTR). The bill saves from repeal and re-enacts the exemption related to information received from an individual from another state or nation or the Federal Government that is otherwise confidential or exempt pursuant to the laws of that jurisdiction. Instead of re-enacting the exemption for an individual's medical record, the bill revises the law to exempt information which identifies a donor of specimens or information to the brain tumor registry and repository. In addition, the bill authorizes disclosure of exempted information maintained by the FCBTR for bona fide research under specified conditions.

Because this bill expands an existing exemption, it requires a two-thirds vote of each house of the Legislature for passage.

This bill substantially amends s. 381.8531, F.S.

## II. Present Situation:

### Florida's Public Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892.[1] In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

[1] Section 1390, 1391 F.S. (Rev. 1892).

Section 24(a), Art. I, of the Florida Constitution, provides that:

> Every person 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. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public Records Act is contained in ch. 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record[2] must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency[3] records are to be available for public inspection.

The Florida Supreme Court has interpreted the definition of "public record" to encompass all materials made or received by an agency in connection with official business which are "intended 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 from 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 exemption may not contain other substantive provisions, although it may contain multiple exemptions relating to one subject.[8]

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is

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[2] Section 119.011(12), F.S., defines "public records" to include "all documents, papers, letters, maps, books, tapes, photographs, film, 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] Section 119.011(2), F.S., defines "agency" 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."

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

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

[6] FLA. CONST. art. I, s. 24(c) (1992).

[7] *Memorial Hospital-West Volusia, Inc. 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] *Supra* fn. 6.

made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.[9] If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[10]

Access to public records is a substantive right and therefore, a statute affecting that right is presumptively prospective in its application.[11] There must be a clear legislative intent for a statute affecting substantive rights to apply retroactively.[12]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[13] provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment.[14] The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.[15] 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.[16] An exemption meets the statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects 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 the safety of such individuals; or
- 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 would injure the affected entity in the marketplace.[17]

The act also requires the Legislature to consider the following six questions that go to the scope, public purpose, and necessity of the exemption:[18]

- 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?

[9] Attorney General Opinion 85-62, August 1, 1985.
[10] *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So. 2d 289 (Fla. 1991).
[11] *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001).
[12] *Id.*
[13] Section 119.15, F.S.
[14] Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a substantially amended exemption if the exemption is expanded to cover additional records. As with a new exemption, a substantially amended exemption is also subject to the 5-year review.
[15] Section 119.15(6)(b), F.S.
[16] *Id.*
[17] *Id.*
[18] Section 119.15(6)(a), F.S.

- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, 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?

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.[19] If the exemption is r-eenacted 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,[20] then a public necessity statement and a two-thirds vote for passage are not required.[21]

**Brain Tumors**

Malignant brain tumors are one of the most virulent forms of cancer. Brain tumors can be either primary – those that start in the brain and generally stay there, or metastatic – those that begin as a cancer elsewhere in the body and spread to the brain.[22] Some tumors are not cancer but can cause disability and death because of their location in the brain.[23] They can press on sensitive areas and cause serious health problems and surgery to remove them has risks.

Brain tumors are the:
- Second leading cause of cancer-related deaths in children under age 20 (leukemia is the first);
- Second leading cause of cancer-related deaths in males up to age 39;
- Second leading cause of cancer-related deaths in females under age 20; and
- Fifth leading cause of cancer-related deaths in females ages 20–39.6[24]

An estimated 62,930 new cases of primary brain tumors were expected to be diagnosed in 2010 and includes both malignant (23,720) and non-malignant (39,210) brain tumors.[25]

Patients with moderately severe malignant tumors typically survive for two to 5 years, whereas those with severe forms live only 12 to 15 months on average, even with optimal treatment.[26] The normal course of treatment for malignant tumors is surgery followed by a combination of chemotherapy and radiation.

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[19] *Supra* fn. 6.
[20] An example of an exception to a public records exemption would be allowing another agency access to confidential or exempt records.
[21] *Cf.*, *State v. Knight*, 661 So. 2d 344 (Fla. 4th DCA 1995).
[22] National Brain Tumor Society, *Brain Tumor FAQ*, available at: http://www.braintumor.org/patients-family-friends/about-brain-tumors/brain-tumor-faq.html (Last visited on January 4, 2011).
[23] *Id.*
[24] American Brain Tumor Association: *Facts and Statistics, 2010*, available at: http://www.abta.org/sitefiles/pdflibrary/ABTA-FactsandStatistics2010v3.pdf (Last visited on January 4, 2011) (citing Ahmedin Jemal et al.; *Cancer Statistics, 2009*; CA: A Cancer Journal for Clinicians; American Cancer Society; May 2009).
[25] *Id.*
[26] The Florida Center for Brain Tumor Research, Annual Report January 2009 – December 2009, citing Patrick Y. Wen and Santosh Kesari, "Malignant Gliomas in Adults," *The New England Journal of Medicine* 2008; 359: 492-507. (A copy of the report is on file with the Florida Senate Committee on Health Regulation).

**The Florida Center for Brain Tumor Research**

The Florida Legislature established the FCBTR within the Evelyn F. and William L. McKnight Brain Institute of the University of Florida on July 1, 2006.[27] The Legislature initially appropriated $500,000 for the FCBTR.[28] In 2009 and 2010, the Legislature appropriated $500,000 to the FCBTR.[29]

The purpose of the FCBTR is to find cures for brain tumors by:

- Establishing a coordinated effort among the state's public and private universities and hospitals and the biomedical industry to discover brain tumor cures and develop brain tumor treatment modalities;
- Expanding the state's economy by attracting biomedical researchers and research companies to the state;
- Developing and maintaining a brain tumor registry that is an automated, electronic, and centralized database of individuals with brain tumors; and
- Fostering collaboration with brain cancer research organizations and other institutions, providing a central repository for brain tumor biopsies from individuals throughout the state, improving and monitoring brain tumor biomedical research programs within the state, facilitating funding opportunities, and fostering improved technology transfer of brain tumor research findings into clinical trials and widespread public use.[30]

A Scientific Advisory Council (The Council) is established within the FCBTR.[31] The Council is required to meet at least annually, however it generally meets twice per year.[32] The Council consists of members from the University of Florida, the Scripps Research Institute Florida, Cleveland Clinic in Florida, M.D. Anderson Cancer Center Orlando, Mayo Clinic in Jacksonville, H. Lee Moffitt Cancer Center and Research Institute, the University of Miami, and a neurosurgeon in private practice.[33]

**The Registry**

The FCBTR maintains a collaborative, statewide registry of banked cancerous and non-cancerous brain tumor specimens, matched samples of DNA, plasma, serum and cerebrospinal fluid, clinical and demographic information, and quality-of-life assessments obtained from patients.[34]

As of January 5, 2010, 742 patients contributed tissue to the bank. There are 2,550 brain tumor tissue samples and 2,469 plasma, serum, DNA, and cerebrospinal fluid samples stored in the

[27] Section 381.853, F.S., was enacted in ch. 2006-258, Laws of Florida.
[28] The FCBTR is to be funded through private, state, and federal sources. See s. 381.853(4)(g), F.S.
[29] *See* ch. 2009-81 and ch. 2010-152, Laws of Florida.
[30] The Florida Center for Brain Tumor Research, Annual Report January 2009 – December 2009. A copy of this report is on file with the Florida Senate Health Regulation Committee.
[31] Section 381.853(5), F.S.
[32] Response to the Florida House of Representative's questionnaire by the Florida Center for Brain Tumor Research dated September 8, 2010. A copy of this response is on file with the Florida Senate Health Regulation Committee.
[33] *Id. See also* s. 381.853(5)(a), F.S.
[34] *Supra* fn. 26.

FCBTR bio-repository. One hundred forty-two samples have been distributed from the bio-repository for research purposes.[35]

Patients, located in and outside of Florida, are asked to participate in the FCBTR's bio-repository and registry, which has been approved by an Institutional Review Board,[36] to provide valuable specimens and data for future research.[37] The patient signs an informed consent form to authorize the collection and banking of his or her specimens.[38] The banked materials are made available to researchers in Florida and beyond who are investigating improved treatments and cures for brain tumors.[39]

A web-based database stores demographic, clinical and quality-of-life data, creates a registry of participants, and bar-codes and tracks the samples. This clinical database contains information available (in unidentifiable format) to researchers who study brain tumors.[40] Although the registry receives information that identifies an individual donor, neither the registry nor the FCBTR obtain a copy of the donor's medical record.[41] According to a representative from the FCBTR, no researcher has requested information that identifies an individual donor.[42] However, it is conceivable that certain researchers may need such information to further their research objectives. Currently, the law does not authorize release of this information for research purposes.

**Protecting Health Information in Research**

The federal Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule establishes national standards, and requires appropriate safeguards, to protect individuals' medical records and other personal health information. [43] The Privacy Rule applies only to "covered entities," which are health plans, health care clearinghouses, and those health care providers that conduct certain health care transactions electronically.[44] The Privacy Rule also gives patients rights over their health information, including rights to examine and obtain a copy of their health records and to request corrections; it also sets limits and conditions on the uses

[35] *Id.*
[36] An Institutional Review Board is any board, committee, or other group formally designated by an institution to review, to approve the initiation of, and to conduct periodic review of, biomedical research involving human subjects to assure the protection of the rights and welfare of the human subjects. *See* 21 C.F.R. Part 56.
[37] *Supra* fn. 26.
[38] Section 381.853(3), F.S., provides for a patient to sign a form to opt-out of participation in the registry; however the FCBTR requires an informed consent to participate in the registry.
[39] *Supra* fn. 26.
[40] *Id.*
[41] Email received by professional staff of the Florida Senate Health Regulation Committee from a representative of the FCBTR on July 27, 2010. A copy of the email is on file with the committee.
[42] *Id.*
[43] U.S. Department of Health and Human Services, *Health Information Privacy: The Privacy Rule*, available at http://www.hhs.gov/ocr/privacy/hipaa/administrative/privacyrule/index.html (Last visited on January 5, 2011).
[44] *Id. See also* U.S. Department of Health and Human Services, *HIPAA Privacy Rule: To Whom Does the Privacy Rule Apply and Whom Will It Affect?*, available at http://privacyruleandresearch.nih.gov/pr_06.asp (Last visited January 5, 2011).

and disclosures that may be made of such information without patient authorization.[45] The Privacy Rule supplements other federal protections for research involving human subjects.[46]

Many organizations, institutions, and researchers that use, collect, access, and disclose individually identifiable health information are not covered entities.[47] To gain access for research purposes to protected health information created or maintained by covered entities, the researcher or other organization may have to provide supporting documentation on which the covered entity may rely in meeting the requirements, conditions, and limitations of the Privacy Rule.[48]

In 2009, the Institute of Medicine's Committee on Health Research and the Privacy of Health Information issued a report concluding that the HIPAA Privacy Rule does not adequately protect the privacy of people's personal health information and hinders important health research discoveries.[49]

The FCBTR also has a Certificate of Confidentiality from the National Institutes of Health.[50] Certificates of Confidentiality offer an important protection for the privacy of research study participants by protecting identifiable research information from forced disclosure (e.g., through a subpoena or court order).[51] The HIPPA Privacy Rule does not protect against all forced disclosure since it permits disclosures required by law, for example. Various Federal agencies may grant a Certificate of Confidentiality for studies that collect information that, if disclosed, could damage subjects' financial standing, employability, insurability, or reputation, or have other adverse consequences. By protecting research and institutions from forced disclosure of such information, Certificates of Confidentiality help achieve research objectives and promote participation in research studies.[52]

**Institutional Review Boards (IRB)**

Under federal Food and Drug Administration regulations, an IRB is an appropriately constituted group that has been formally designated to review and monitor biomedical research involving human subjects.[53] An IRB has the authority to approve, require modifications in (to secure

[45] *Supra* fn. 43.
[46] *See e.g.*, The Common Rule, 45 C.F.R. Part 46, Subpart A and the Food and Drug Administration's human subject protections regulations 21 C.F.R. Parts 50 and 56, which primarily address subjects involved in clinical investigations.
[47] U.S. Department of Health and Human Services, *HIPAA Privacy Rule: To Whom Does the Privacy Rule Apply and Whom Will It Affect?*, available at http://privacyruleandresearch.nih.gov/pr_06.asp (Last visited January 5, 2011).
[48] NIH Publication Number 03-5388 Protecting Personal Health Information in Research: Understanding the HIPAA Privacy Rule, April 2003, available at: http://privacyruleandresearch.nih.gov/pdf/HIPAA_Privacy_Rule_Booklet.pdf, (Last visited on January 5, 2011).
[49] The Institute of Medicine, *Beyond the HIPAA Privacy Rule: Enhancing Privacy, Improving Health Through Research*. The National Academies' press release announcing the report is available at: http://www.iom.edu/Reports/2009/Beyond-the-HIPAA-Privacy-Rule-Enhancing-Privacy-Improving-Health-Through-Research.aspx, (Last visited on January 5, 2011).
[50] *Supra* fn. 26.
[51] U.S. Department of Health and Human Services, *Certificates of Confidentiality: Background Information*, available at http://grants.nih.gov/grants/policy/coc/background.htm (Last visited on January 5, 2011).
[52] *Id.*
[53] *See supra* fn. 36.

approval), or disapprove research. This group review serves an important role in the protection of the rights and welfare of human research subjects.[54]

The purpose of IRB review is to assure, both in advance and by periodic review, that appropriate steps are taken to protect the rights and welfare of humans participating as subjects in the research.[55] To accomplish this purpose, IRBs use a group process to review research protocols and related materials (e.g., informed consent documents and investigator brochures) to ensure protection of the rights and welfare of human subjects of research.[56]

IRB approval means the determination of the IRB that the research has been reviewed and may be conducted at an institution within the constraints set forth by the IRB and by other institutional and federal requirements.

**Public Records Exemption for the FCBTR**

Chapter 2006-259, L.O.F., enacted concurrently with the establishment of the FCBTR, made certain information held by the FCBTR confidential and exempt from s. 119.07(1), F.S., and s. 24, Art. I, of the Florida Constitution.[57]

The exempted information includes an individual's medical records and any information received from an individual from another state or nation or the Federal Government that is otherwise confidential or exempt pursuant to the laws of that state or nation or pursuant to federal law. This law was codified in s. 381.8531, F.S., which is subject to the Open Government Sunset Review Act.[58] Accordingly, it will be repealed automatically on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

Exemptions from the public records law must be created by a general law which 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.[59] The Legislature expressed the reasons supporting the public necessity for making an individual's medical records held by the brain tumor registry confidential and exempt from the public records requirements as follows:

> Matters of personal health are traditionally private and confidential concerns between the patient and the health care provider. The private and confidential nature of personal health matters pervades both the public and private health care sectors. For these reasons, the individual's expectation of and right to privacy in all matters regarding his or her personal health

[54] U.S. Food and Drug Administration, *Institutional Review Boards Frequently Asked Questions-Information Sheet*, available at http://www.fda.gov/RegulatoryInformation/Guidances/ucm126420.htm (Last visited on January 5, 2011).
[55] *Id.*
[56] *Id.*
[57] The FCBTR also operates under the public records exemptions in s. 760.40, F.S., related to genetic testing and DNA analysis. DNA analysis is defined in s. 760.40, F.S., to mean the medical and biological examination and analysis of a person to identify the presence and composition of genes in that person's body. The term includes DNA typing and genetic testing. Results of a DNA analysis are confidential and exempt from the public records law.
[58] Section 119.15, F.S.
[59] *Supra* fn. 7.

> necessitates this exemption. [In addition], …the release of such record could be defamatory to the patient or could cause unwarranted damage to the name or reputation of that patient.

Research from the review disclosed that the FCBTR does not receive a donor's medical records. However, the FCBTR does receive tissue samples, certain medical information about the donor that is extracted from the donor's medical record, and information which identifies the donor. The FCBTR has requested that the exemption be revised to reflect the practice of the FCBTR.[60] This will help ensure that a potential donor is not discouraged from donating to the repository.

The Legislature expressed the reasons supporting the public necessity for making information received by the brain tumor registry from an individual from another state or nation or the Federal Government that is otherwise exempt or confidential pursuant to the laws of that state or nation or pursuant to federal law confidential and exempt from the Florida public records requirement because without this protection, another state or nation or the Federal Government might be less likely to provide information to the registry in the furtherance of its duties and responsibilities.

Representatives from the FCBTR indicated that they have received information from a person from another state or nation or the Federal Government that is confidential or exempt pursuant to the laws of that state or nation or pursuant to federal law.[61] The representative cited protections under HIPAA and its implementing regulations and state law, as well as the federal Common Rule as the basis for protection from public disclosure in those jurisdictions.[62]

As a part of participating in the Open Government Sunset Review process, the FCBTR requested the authority under Florida's law to release identifying information consistent with federal and another state's laws if applicable when necessary to further the purposes of the research and when additional safeguards are in place to protect that information.[63]

Based on research conducted as part of the Open Government Sunset Review Act as required by s. 381.8531(2), F.S., professional staff in the Senate Committee on Health Regulation recommends that the Legislature:

- Re-enact and modify the public records exemption in s. 381.8531, F.S., to delete the exemption for an individual's medical record and instead exempt any personal identifying information pertaining to a donor to the registry and repository. This exemption reflects the practice of the FCBTR, furthers the purpose of the FCBTR to foster research objectives, and complies with the statutory requirements for an exemption because it protects information of a personal nature;
- Authorize the release of identifying information when it is specifically needed to further a particular medical or scientific research project related to brain tumors and when additional privacy safeguards are in place; and

[60] *Supra* fn. 41.
[61] *Supra* fn. 32.
[62] *Id. See supra* fn. 46 for information regarding the Common Rule.
[63] *Supra* fn. 41.

- Re-enact the exemption related to information received by the brain tumor registry from an individual from another state or nation. Continuing the exemption promotes donations from persons in other jurisdictions which, in turn, will further the purposes of the FCBTR.

## III. Effect of Proposed Changes:

The bill exempts information held by the FCBTR before, on, or after July 1, 2011,[64] which identifies an individual who has donated specimens or information to the brain tumor registry and repository from public disclosure. This information is made confidential and exempt from s. 119.07(1), F.S., and s. 24, Art. I, of the Florida Constitution. The bill eliminates the exemption from public disclosure for an individual's medical record because the FCBTR does not receive or maintain an individual's medical record.

The bill provides for disclosure of a donor's personal identifying information or any information that is received from an individual from another state or nation or the Federal Government that is confidential or exempt pursuant to the laws of that state or nation or pursuant to federal law when the research cannot otherwise be conducted without that information. Specific conditions for such release are included in the bill. The confidential and exempt information may only be disclosed to a person engaged in bona fide research if the researcher agrees to:

- Submit to the FCBTR a research plan that has been approved by an institutional review board and that specifies the exact nature of the information requested, the intended use of the information, and the reason that the research could not practicably be conducted without the information;
- Sign a confidentiality agreement with the FCBTR;
- Maintain the confidentiality of the personal identifying information or otherwise confidential or exempt information; and
- To the extent permitted by law and after the research is concluded, destroy any confidential records or information obtained.

Notwithstanding the authorization in state law for such release of identifying information, the disclosure must comply with applicable federal law.

Because the exemption from the public records law is modified and broadens the scope of the exemption, a statement pertaining to the public necessity for the exemption is provided and a two-thirds vote of each house is required to enact the bill. Additionally, the law must be scheduled for review again under the Open Government Sunset Review Act. Accordingly, the proposed committee bill provides for repeal of this law on October 2, 2016, if not reviewed and saved from repeal through reenactment by the Legislature.

The act will take effect on July 1, 2011.

[64] The phrase "before, on, or after July 1, 2011" provides a clear legislative intent that the law should apply retroactively. As mentioned previously in the analysis, there must be a clear legislative intent for a statute affecting substantive rights to apply retroactively. *See supra* fn. 11, 12.

**Other Potential Implications**:

If the Legislature chooses not to retain or modify the public records exemption for the FCBTR repository and registry, the exemption will expire on October 2, 2011. Without the exemption, certain information in the repository and registry of the FCBTR might become public, deter donations, and impede the timely discovery of treatments or cures for brain tumors.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of s. 18, Art. VII, of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The bill reenacts and amends an existing public records exemption in s. 381.8531, F.S. Because the bill expands the exemption, it contains a constitutionally required statement of public necessity for the expansion. Additionally, this bill is subject to a two-thirds vote of each house of the Legislature for enactment as required by s. 24(c), Art. I, of the Florida Constitution, because it expands the public records exemption.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of subsection 19(f), Art. III, of the Florida Constitution.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

**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.)

Prepared By: The Professional Staff of the Rules Committee

| | |
|---|---|
| BILL: | SB 568 |
| INTRODUCER: | Judiciary Committee |
| SUBJECT: | OGSR/Court Records Related to Court Monitors |
| DATE: | April 1, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Treadwell/Maclure | Maclure | JU | **Favorable** |
| 2. | Naf | Roberts | GO | **Favorable** |
| 3. | Naf | Phelps | RC | **Pre-meeting** |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

This bill is the result of the Judiciary Committee's Open Government Sunset Review of the public-records exemptions for orders appointing nonemergency and emergency court monitors, monitors' reports, and orders finding no probable cause in guardianship proceedings. These public-records exemptions stand repealed on October 2, 2011, unless reenacted by the Legislature.

The bill retains the exemptions and makes organizational changes for clarity. The bill also removes the confidential status of court orders appointing nonemergency court monitors and makes these orders exempt rather than confidential and exempt. In addition, the bill eliminates a reference to "court determinations" in the public-records exemption relating to determinations and orders finding no probable cause for further court action.

This bill substantially amends section 774.1076, Florida Statutes.

## II. Present Situation:

### Florida Public-Records Law

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public-records law in 1892.[1] One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level:

[1] Sections 1390, 1391 F.S. (Rev. 1892).

Every person 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. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.[2]

Consistent with this constitutional provision, Florida's Public-Records Act provides that, unless specifically exempted, all public records must be made available for public inspection and copying.[3]

The term "public records" 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.[4]

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency[5] in connection with official business which are used to "perpetuate, communicate, or formalize knowledge of some type."[6] Unless made exempt, all such materials are open for public inspection as soon as they become records.[7]

Only the Legislature is authorized to create exemptions to open-government requirements.[8] Exemptions must be created by general law, which must specifically state the public necessity justifying the exemption.[9] Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[10] A bill enacting an exemption or substantially amending an existing exemption[11] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[12]

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[2] FLA. CONST. art. I, s. 24(a).
[3] Section 119.07, F.S.
[4] Section 119.011(12), F.S.
[5] The word "agency" is defined in s. 119.011(2), F.S., to mean "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."
[6] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).
[7] *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).
[8] FLA. CONST. art. I, s. 24(c).
[9] *Id.*
[10] *Id.*
[11] Pursuant to s. 119.15(4)(b), F.S., an existing exemption is substantially amended if the exemption is expanded to cover additional records or information.
[12] FLA. CONST. art. I, s. 24(c).

There is a difference between records that the Legislature makes exempt from public inspection and those that it makes exempt and confidential.[13] If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[14] If a record is simply made exempt from disclosure requirements, the exemption does not prohibit the showing of such information at the discretion of the agency holding it.[15]

**Public Access to Court Records**

Although Florida courts have consistently held that the judiciary is not considered an "agency" for purposes of the Public-Records Act,[16] the Florida Supreme Court has found that "both civil and criminal proceedings in Florida are public events" and that it will "adhere to the well established common law right of access to court proceedings and records."[17] Furthermore, there is a constitutional guarantee of access to judicial records established in the Florida Constitution.[18] This constitutional provision provides for public access to judicial records, except for those records expressly exempted by the Florida Constitution, Florida law in effect on July 1, 1993, court rules in effect on November 3, 1992, or by future acts of the Legislature in accordance with the Constitution.[19]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act provides for the systematic review of exemptions from the Public-Records Act on a five-year cycle ending October 2 of the fifth year following the enactment or substantial amendment of an exemption.[20] Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services 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.[21] Under the Open Government Sunset Review Act, an exemption may be created, revised, or retained only if it serves an identifiable public purpose and it is no broader than necessary to meet the public purpose it serves. [22] An identifiable public purpose is served if the exemption meets one of three specified purposes and 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 exemption meets the statutory criteria if it:

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

[13] *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).
[14] *Id.*
[15] *Id.* at 54.
[16] *Times Publishing Co. v. Ake*, 660 So. 2d 255 (Fla. 1995) (holding that the judiciary, as a coequal branch of government, is not an "agency" subject to control by another coequal branch of government).
[17] *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113, 116 (Fla. 1988).
[18] FLA. CONST. art. I, s. 24.
[19] *Id.*
[20] Section 119.15(3), F.S.
[21] Section 119.15(5)(a), F.S.
[22] Section 119.15(6)(b), F.S.

- Protects 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 the safety of such individuals; or
- 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 would injure the affected entity in the marketplace.[23]

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 so, 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?[24]

**Guardianship**

The intent of the Florida Guardianship Law in ch. 744, F.S., is to provide the least restrictive means necessary to provide assistance to a person who is not fully capable of acting on his or her own behalf.[25] A guardianship is:

> a trust relationship of the most sacred character, in which one person, called a "guardian," acts for another, called the "ward," whom the law regards as incapable of managing his own affairs.[26]

Any person may file, under oath, a petition for determination of incapacity alleging that a person is incapacitated. After a petition for determination of incapacity has been filed, a court must appoint an examining committee comprised of three health care professionals to examine and report the condition of the alleged incapacitated person.[27] If the examining committee determines that the alleged incapacitated person is not incapacitated, the court must dismiss the petition for determination of incapacity.[28] If the examining committee determines that the alleged incapacitated person is incapacitated, the court must hold a hearing on the petition. If after a hearing the court determines that a person is incapacitated, the court must also find that alternatives to guardianship were considered and that no alternatives to guardianship will sufficiently address the problems of the incapacitated person and appoint a guardian.[29]

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[23] *Id*.
[24] Section 119.15(6)(a), F.S.
[25] Section 744.1012, F.S.
[26] 28 FLA. JUR. 2D *Guardian and Ward* s. 1 (2004).
[27] Section 744.331(3), F.S.
[28] Section 744.331(4), F.S.
[29] *See* s. 744.331(6)(b) and (f), F.S.

**Authority of a Guardian**

An order appointing a guardian must prescribe the specific powers and duties of the guardian and the delegable rights that have been removed from the ward.[30] The order must preserve an incapacitated person's right to make decisions to the extent that he or she is able to do so.[31] A guardian is empowered with the authority to protect the assets of the ward and to use the ward's property to provide for his or her care.[32] Some of the guardians' powers may only be exercised with court approval.[33]

**Court Monitoring in Guardianship Cases**

Court monitoring is a mechanism "courts can use to review a guardian's activities, assess the well-being of the ward, and ensure that the ward's assets are being protected."[34] Court monitoring is necessary because often after a person is declared incapacitated no one exists to bring concerns about the ward to the attention of the court.[35] According to the Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, "there is a need for greater oversight [of guardians], to protect individuals who are subject to guardianship."[36]

**Nonemergency Court Monitors**

Court monitors may be appointed by a court upon inquiry by an interested person or upon its own motion. However, a family or any person with a personal interest in the proceedings may not serve as a monitor.[37] The order appointing the monitor must be served upon the guardian, the ward, and any other person determined by the court.

A court monitor has the authority to investigate, seek information, examine documents, and interview the ward. The court monitor's findings must be reported to the court, and if it appears from the monitor's report that further action by the court is necessary to protect the ward's interests, the court must hold a hearing with notice and enter any order necessary to protect the ward.[38] A monitor may receive a reasonable fee paid from the property of the ward for his or her services.[39] If the court determines that a motion to appoint a court monitor was made in bad faith, the court may assess the costs of the proceeding, including attorney's fees, against the movant.[40]

[30] Section 744.344(1), F.S.
[31] Section 744.344(2), F.S.
[32] *See* ss. 744.361(4) and 744.444, F.S.
[33] Section 744.441, F.S.
[34] Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, *Guardianship Monitoring in Florida: Fulfilling the Court's Duty to Protect Ward*, 13 (2003).
[35] *Id.*
[36] *Id.* at 4.
[37] Section 744.107(1), F.S.
[38] Section 744.107(3), F.S. These actions include amending the plan, requiring an accounting, ordering production of assets, freezing assets, suspending a guardian, or initiating proceedings to remove a guardian.
[39] Section 744.107(4), F.S. A full-time state, county, or municipal employee or officer cannot be paid a fee for services as a court monitor.
[40] *Id.*

**Emergency Court Monitors**

Upon inquiry of an interested party or its own volition, the court may appoint a court monitor on an emergency basis without providing notice to the guardian, the ward, or other interested parties.[41] The court must specifically find that:

- There appears to be imminent danger that the physical or mental health or safety of the ward will be seriously impaired; or
- The ward's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.[42]

Within 15 days after the entry of the order appointing the monitor, the monitor must file his or her report of findings and recommendations to the court. The court reviews the report and determines whether there is probable cause to take further action to protect the ward.[43] If the court finds probable cause, it must issue an order to show cause to the guardian or other respondent including the specific facts constituting the conduct charged and requiring the respondent to appear before the court to address the allegations.[44] Following the show-cause hearing, the court may impose sanctions on the respondent and take any other action necessary to protect the ward.[45]

Identical to the provisions governing nonemergency court monitors, an emergency court monitor may receive a reasonable fee paid from the property of the ward for his or her services.[46] If the court determines that a motion to appoint an emergency court monitor was made in bad faith, the court may assess the costs of the proceeding, including attorney's fees, against the movant.[47]

**Court-Records Exemptions Relating to Court Monitors**

In conjunction with the creation of the court monitor system in guardianship proceedings, the Legislature created exemptions from public access to judicial records related to court monitors in guardianship proceedings. Under these public-records exemptions, any order of a court appointing a nonemergency court monitor is confidential and exempt from public disclosure.[48] Similarly, the reports of an appointed court monitor relating to the medical condition, financial affairs, or mental health of the ward are confidential and exempt from public disclosure.[49] The public may access these records as determined by the court or upon demonstration of good cause to review the records. This exemption expires, and the public may access these records, if a court

[41] Section 744.1075(1)(a), F.S.
[42] *Id.*
[43] Section 744.1075(3), F.S.
[44] Section 744.1075(4)(a), F.S.
[45] Section 744.1075(4)(c), F.S. These actions include: entering a judgment of contempt; ordering an accounting; freezing assets; referring the case to local law enforcement agencies or the state attorney; filing an abuse, neglect, or exploitation complaint with the Department of Children and Families; or initiating proceedings to remove the guardian.
[46] Section 744.1075(5), F.S. A full-time state, county, or municipal employee or officer cannot be paid a fee for services as an emergency court monitor.
[47] *Id.*
[48] Section 744.1076(1)(a), F.S. The companion exemption for emergency court monitors contained in s. 744.1076(2)(a), F.S., is only "exempt" rather than "confidential and exempt."
[49] Section 744.1076(1)(b), F.S.

makes a finding of probable cause for further court action after consideration of the court monitor's report.[50] However, information in the report that is otherwise made confidential or exempt by law retains its confidential or exempt status.

In the emergency court monitor context, a similar public-records exemption exists in Florida law. Any order of a court appointing an emergency court monitor is exempt from public disclosure.[51] Similarly, the reports of an appointed court monitor relating to the medical condition, financial affairs, or mental health of the ward are confidential and exempt from public disclosure.[52] The public may access these records as determined by the court or upon demonstration of good cause to review the records. This exemption expires, and the public may access these records, if a court makes a finding of probable cause for further court action after consideration of the court monitor's report.[53] However, information in the report that is otherwise made confidential or exempt by law retains its confidential or exempt status.

Court determinations relating to a finding of no probable cause and court orders finding no probable cause in the nonemergency and emergency court monitor contexts are also confidential and exempt from public disclosure.[54] However, the court may allow access to these determinations and orders upon a showing of good cause.

In its statement of public necessity accompanying the creation of these exemptions, the Legislature recognized that:

> release of the exempt order [appointing court monitors] would produce undue harm to the ward. In many instances, a court monitor is appointed to investigate allegations that may rise to the level of physical neglect or abuse or financial exploitation. When such allegations are involved, if the order of appointment is public, the target of the investigation may be made aware of the investigation before the investigation is even underway, raising the risk of concealment of evidence, intimidation of witnesses, or retaliation against the reporter. The Legislature finds that public disclosure of the exempt order would hinder the ability of the monitor to conduct an accurate investigation if evidence has been concealed and witnesses have been intimidated.[55]

With regard to the reports of court monitors, the Legislature recognized that release of these reports would produce undue harm to the ward and hinder the investigation of the monitor. In addition, the Legislature stated that the reports may contain sensitive, personal information that, if released, could cause harm or embarrassment to the ward or his or her family.

The Legislature concluded that it is a public necessity that court determinations relating to a finding of no probable cause and court orders finding no probable cause must be made

[50] Section 744.1076(1)(c), F.S.
[51] Section 744.1076(2)(a), F.S.
[52] Section 744.1076(2)(b), F.S.
[53] Section 744.1076(2)(c), F.S.
[54] Section 744. 1076(3), F.S.
[55] Laws of Fla. 2006-129, s. 2.

confidential and exempt because unfounded allegations against a guardian could be damaging to the reputation of the guardian and cause undue embarrassment as well as could invade the guardian's privacy.[56]

The public-records exemptions will stand repealed on October 2, 2011, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act.

**Judiciary Committee's Open Government Sunset Review**

During its review of these public-records exemptions under the Open Government Sunset Review Act, the professional staff of the Judiciary Committee interviewed judges, guardianship practitioners, clerks of court, the Florida Department of Elder Affairs, The Florida Bar, and other interested parties to gauge the utility of the exemptions. Senate professional staff also reviewed guardianship files in which a court monitor had been appointed. As a result of the interviews and file review, Senate professional staff recommended that the Legislature retain the public-records exemptions established in s. 744.1076, F.S., which make orders appointing nonemergency and emergency court monitors, reports of those monitors, and findings of no probable cause exempt or confidential and exempt from public disclosure.[57] Senate professional staff concluded that, in addition to protecting the ward from the disclosure of information of a sensitive, personal nature, the exemptions also protect a guardian from unwarranted damage to his or her reputation. Furthermore, these exemptions are arguably necessary for the administration of the court monitor process.[58]

Senate professional staff also recommended that the Legislature consider reorganizing the exemptions for clarity and providing that the order appointing a nonemergency court monitor be "exempt" only rather than "confidential and exempt." This change would make the exemption consistent with the current public-records exemption for orders appointing emergency court monitors and would allow nonemergency court monitors to share the order as necessary during their investigation.

Senate professional staff also recommended that the Legislature consider deleting the reference to "court determinations relating to a finding of no probable cause" in the public-records exemption relating to determinations and orders finding no probable cause. In practice, the probable cause determination is reduced to a written order. Therefore, the exemption could provide that an "order finding no probable cause" is confidential and exempt from public disclosure.

## III. Effect of Proposed Changes:

This bill is the result of the Judiciary Committee's Open Government Sunset Review of the public-records exemptions for certain court records relating to court monitors in guardianship proceedings found in s. 744.1076, F.S. These public-records exemptions stand repealed on October 2, 2011, unless reenacted by the Legislature.

[56] *Id.*
[57] Materials gathered for this Open Government Sunset Review are on file with the Senate Committee on Judiciary.
[58] A public-records exemption must, among other criteria, protect information of a sensitive, personal nature or be necessary for the effective administration of a program. Section 119.15(6)(b), F.S.

The bill retains the exemptions and makes organizational changes to the statute for clarity. The bill removes the confidential status of court orders appointing nonemergency court monitors for consistency and to allow nonemergency court monitors to share the order with others as necessary to aid in the monitor's investigation. However, under the bill, these orders would retain their current exempt status.

Additionally, the bill removes a reference to "court determinations relating to a finding of no probable cause" in the public-records exemption relating to determinations and orders finding no probable cause because, in practice, the probable cause determination is typically contained in a written order included in the guardianship file. In effect, the bill simplifies the exemption by clearly stating that any order finding no probable cause will be confidential and exempt from public disclosure.

The bill provides an effective date of October 1, 2011.

**Other Potential Implications:**

If the Legislature chooses not to retain the public-records exemptions for orders and reports of court monitors, the exemptions will expire on October 2, 2011. Absent the exemptions, certain sensitive information pertaining to the guardian or the ward may be available to the public, and the court monitor's investigation may be impeded by the disclosure of the order appointing the court monitor.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill retains the existing public-records exemptions. This bill complies with the requirement of Article I, Section 24 of the Florida Constitution that the Legislature address public-records exemptions in legislation separate from substantive law changes.

C. Trust Funds Restrictions:

None.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

**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.)

Prepared By: The Professional Staff of the Rules Committee

| | |
|---|---|
| BILL: | SB 570 |
| INTRODUCER: | Judiciary Committee |
| SUBJECT: | OGSR/Interference with Custody |
| DATE: | April 1, 2011 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Daniell/Maclure | Maclure | JU | **Favorable** |
| 2. | Naf | Roberts | GO | **Favorable** |
| 3. | Naf | Phelps | RC | **Pre-meeting** |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

This bill is the result of the Judiciary Committee's Open Government Sunset Review of a public-records exemption for information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. The exemption will expire on October 2, 2011, unless saved from repeal through reenactment by the Legislature.

Currently, the public-records exemption protects from disclosure the current address and telephone number of a person who takes a minor or incompetent person because the person is a victim of domestic violence or believes that taking the minor or incompetent person is necessary to protect the minor or incompetent person. The exemption also protects the address and telephone number of the minor or incompetent person contained in the report to the sheriff or state attorney. The bill retains the public-records exemption by deleting language providing for the scheduled repeal of the exemption.

This bill substantially amends section 787.03, Florida Statutes.

## II. Present Situation:

### Florida Public-Records Law

Florida has a long history of providing public access to government records. The Legislature enacted the first public-records law in 1892.[1] In 1992, Floridians adopted an amendment to the

[1] Sections 1390, 1391, F.S. (Rev. 1892).

State Constitution that raised the statutory right of access to public records to a constitutional level.[2] Article I, section 24 of the Florida Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

The Public-Records Act[3] specifies conditions under which public access must be provided to records of the executive branch and other agencies. Unless specifically exempted, all agency[4] records are available for public inspection. Section 119.011(12), F.S., defines the term "public records" very broadly to include "all documents, ... tapes, photographs, films, sounds recordings … made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Unless made exempt, all such materials are open for public inspection at the moment they become records.[5]

Only the Legislature is authorized to create exemptions to open-government requirements. 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. A bill enacting an exemption or substantially amending an existing exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[6]

Records may be identified as either exempt from public inspection or exempt and confidential. If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[7] If a record is simply made exempt from public inspection, the exemption does not prohibit the showing of such information at the discretion of the agency holding it.[8]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[9] provides for the systematic review of exemptions from the Public-Records Act in the fifth year after the exemption's enactment. By June 1 of each year, the Division of Statutory Revision of the Office of Legislative Services 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, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.[10] An identifiable public purpose is served if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and

[2] FLA. CONST. art. I, s. 24.
[3] Chapter 119, F.S.
[4] An agency includes any state, county, or municipal officer, department, or other separate unit of government that is created or established by law, as well as any other public or private agency or person acting on behalf of any public agency. Section 119.011(2), F.S.
[5] *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).
[6] FLA. CONST. art. I, s. 24(c).
[7] *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).
[8] *Id*. at 54.
[9] Section 119.15, F.S.
[10] Section 119.15(6)(b), F.S.

cannot be accomplished without the exemption. An identifiable public purpose is served if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- 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
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or combination 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.[11]

The act also requires the Legislature, as part of the review process, to consider the following six questions that go to the scope, public purpose, and necessity of the exemption:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect?
- 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?
- 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?[12]

**Interference with Custody**

The Legislature in 1974 created the offense of interference with custody. Today, there are two variations to the offense. Under one provision, it is a third-degree felony for any person – without legal authority – to knowingly or recklessly take a minor or any incompetent person from the custody of his or her parent, a guardian, a public agency in charge of the child or incompetent person, or any other lawful custodian.[13] Under the second provision, it is a third-degree felony – in the absence of a court order determining custody or visitation rights – for a parent, stepparent, legal guardian, or relative who has custody of a minor or incompetent person to take or conceal the minor or incompetent person with a malicious intent to deprive another person of his or her right to custody.[14]

[11] *Id*.
[12] Section 119.15(6)(a), F.S.
[13] Section 787.03(1), F.S.
[14] Section 787.03(2), F.S.

The statute prescribes three defenses to the offense of interference with custody:

> (a) The defendant had reasonable cause to believe that his or her action was necessary to preserve the minor or the incompetent person from danger to his or her welfare.
> (b) The defendant was the victim of an act of domestic violence or had reasonable cause to believe that he or she was about to become the victim of an act of domestic violence as defined in s. 741.28, [F.S.,] and the defendant had reasonable cause to believe that the action was necessary in order for the defendant to escape from, or protect himself or herself from, the domestic violence or to preserve the minor or incompetent person from exposure to the domestic violence.
> (c) The minor or incompetent person was taken away at his or her own instigation without enticement and without purpose to commit a criminal offense with or against the minor or incompetent person, and the defendant establishes that it was reasonable to rely on the instigating acts of the minor or incompetent person.[15]

Distinct from the three defenses, the statute further specifies that the statute does not apply:

> in cases in which a person having a legal right to custody of a minor or incompetent person is the victim of any act of domestic violence, has reasonable cause to believe he or she is about to become the victim of any act of domestic violence . . . or believes that his or her action was necessary to preserve the minor or the incompetent person from danger to his or her welfare and seeks shelter from such acts or possible acts and takes with him or her the minor or incompetent person.[16]

To avail himself or herself of this exception, a person who takes a minor or incompetent person must comply with each of the following requirements:

- Within 10 days of the taking, make a report to the sheriff or state attorney for the county in which the minor or incompetent person resided. The report must include the name of the person taking the minor or incompetent person, the current address and telephone number of the person and the minor or incompetent person, and the reasons the minor or incompetent person was taken.
- Within a reasonable time of the taking, commence a custody proceeding consistent with the federal Parental Kidnapping Prevention Act[17] or the Uniform Child Custody Jurisdiction and Enforcement Act.[18]
- Inform the sheriff or state attorney of any address or telephone number changes for the person and the minor or incompetent person.[19]

[15] Section 787.03(4)(a)-(c), F.S.
[16] Section 787.03(6)(a), F.S.
[17] 28 U.S.C. s. 1738A.
[18] Sections 61.501-61.542, F.S.
[19] Section 787.03(6)(b), F.S.

**Public-Records Exemption for Interference with Custody**

Under an accompanying public-records exemption, the current address and telephone number of the person taking the minor or incompetent person, as well as the address and telephone number of the minor or incompetent person, contained in the report made to the sheriff or state attorney, are confidential and exempt from public disclosure.[20] As originally enacted in 2000, this exemption applied to "information provided" to a sheriff or state attorney as part of the report filed within 10 days of taking a "child." Under the original broader wording, the public-records exemption captured not only the name and address information, but also the reasons the child was taken.[21] The public-records exemption was scheduled for repeal on October 2, 2005. An Open Government Sunset Review of this exemption, conducted during the 2004-2005 interim legislative period, recommended that the Legislature narrow the exemption to exclude the reason the child was taken.[22]

During the 2005 Regular Session, the Legislature reenacted the public-records exemption and saved it from then-imminent repeal. The Legislature, consistent with the Open Government Sunset Review report, also narrowed the exemption, removing the reason the child was taken from the protection from public disclosure afforded by the public-records exemption.[23]

The process of reviewing the public-records exemption during the 2004-2005 interim drew attention to a number of statutory inconsistencies and ambiguities in the underlying interference-with-custody offense, as well as with respect to interplay between the offense and the public-records exemption. As a consequence, the 2005 legislation reenacted the public-records exemption for one year only – scheduling it for repeal again on October 2, 2006. Further, the legislation provided for the repeal of the entire interference-with-custody statute on that date unless it was reviewed and saved from repeal through reenactment.[24] During the 2006 Regular Session, the Legislature passed House Bill 7113, reenacting and revising the public-records exemption for interference with custody.[25] Among other changes, the 2006 legislation included within the scope of the public-records exemption the address and telephone information for an incompetent person who is taken, in addition to the same information for a child.

The public-records exemption for interference with custody is again scheduled for repeal on October 2, 2011, unless saved from repeal through reenactment by the Legislature. In reviewing the public-records exemption under the Open Government Sunset Review Act, Senate professional staff of the Judiciary Committee found that there is a public necessity in continuing to keep confidential and exempt certain information relating to a person who takes a minor or incompetent person because he or she is the victim of domestic violence, or believes he or she is about to become a victim of domestic violence, or in order to maintain the safety of the minor or incompetent person. In order to gauge how this exemption functions and its importance,

[20] Section 787.03(6)(c), F.S.
[21] See s. 787.03(6)(c), F.S. (2000).
[22] Comm. on Judiciary, The Florida Senate, *Review of Public Records Exemption for Certain Sheriff and State Attorney Records Relating to Interference with Custody, s. 787.03, F.S.* (Interim Report 2005-217) (Nov. 2004), *available at* http://www.flsenate.gov/data/Publications/2005/Senate/reports/interim_reports/pdf/2005-217ju.pdf (last visited Aug. 31, 2010).
[23] Chapter 2005-89, Laws of Fla.
[24] See s. 787.03(7), F.S. (2005); s. 1, ch. 2005-89, L.O.F.
[25] Chapter 2006-115, Laws of Fla.

professional staff sent questionnaires to interested parties, including the Florida Prosecuting Attorneys Association, the Florida Sheriffs Association, and the Florida Coalition Against Domestic Violence. Responses from the questionnaire indicated that the exemption is necessary to provide protection to victims of domestic violence, as well as a child or incompetent person who may also be in danger.[26] Based on the questionnaire responses, this public-records exemption appears to serve a public purpose by maintaining the safety of the person taking the minor or incompetent person, as well as the minor or incompetent person, by protecting their location and phone number. The Open Government Sunset Review Act provides that one of the identifiable public purposes for retaining an exemption is protecting sensitive information about an individual, the release of which would jeopardize the safety of that individual.[27]

Professional staff of the Committee on Judiciary recommends that the Legislature reenact the public-records exemption established in paragraph (c) of s. 787.03(6), F.S., which makes specified information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody exempt from disclosure.

## III. Effect of Proposed Changes:

This bill is the result of the Judiciary Committee's Open Government Sunset Review of a public-records exemption for information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. Currently, the exemption protects from disclosure the current address and telephone number of a person who takes a minor or incompetent person because the person is a victim of domestic violence or believes that taking the minor or incompetent person is necessary to protect the minor or incompetent person. The exemption also protects the address and telephone number of the minor or incompetent person contained in the report to the sheriff or state attorney. This public-records exemption will expire on October 2, 2011, unless saved from repeal through reenactment by the Legislature.

This bill retains the public-records exemption related to the interference with custody statute by deleting language providing for the scheduled repeal of the exemption.

This bill provides an effective date of October 1, 2011.

**Other Potential Implications**:

If the Legislature chooses not to retain the public-records exemption for interference with custody, the exemption will expire on October 2, 2011. Absent the exemption, the address and telephone number of the person fleeing with a child or incompetent person due to domestic violence would be public and accessible by the person who is alleged to have created the safety threat.

[26] Materials gathered for this Open Government Sunset Review are on file with the Senate Committee on Judiciary.
[27] Section 119.15(6)(b)2., F.S.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill retains the public-records exemption for specified information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody. This bill appears to comply with the requirements of Article I, Section 24 of the Florida Constitution that public-records exemptions be addressed in legislation separate from substantive law changes.

C. Trust Funds Restrictions:

None.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

In order to gain the exception provided in statute for a person fleeing domestic violence or seeking to protect a minor or incompetent person from harm, the person must file a report on their whereabouts with the sheriff or state attorney within 10 days after taking the minor or incompetent person. Some survey respondents expressed concern that the 10-day period was too long. One sheriff explained that law enforcement may spend several days investigating the disappearance of the minor or incompetent person without the benefit of knowing that the minor or incompetent person is safe and in the company of a person having legal custody of the minor or incompetent person. However, according to a representative of an organization that advocates on behalf of domestic violence victims, the 10-day period should not be reduced because a

person fleeing domestic violence often needs that amount of time to find a safe place to stay and file the report.[28]

## VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.



[28] E-mail from Nina Zollo, Florida Coalition Against Domestic Violence, to professional staff of the Judiciary Committee (Sept. 7, 2010) (on file with the Senate Committee on Judiciary).

**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.)

Prepared By: The Professional Staff of the Rules Committee

| | |
|---|---|
| BILL: | CS/SB 572 |
| INTRODUCER: | Governmental Oversight and Accountability Committee and Judiciary Committee |
| SUBJECT: | OGSR/Statewide Public Guardianship Office |
| DATE: | April 1, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Munroe | Maclure | JU | **Favorable** |
| 2. | Naf | Roberts | GO | **Fav/CS** |
| 3. | Naf | Phelps | RC | **Pre-meeting** |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

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

| | | |
|---|---|---|
| A. COMMITTEE SUBSTITUTE..... | X | Statement of Substantial Changes |
| B. AMENDMENTS..... | | Technical amendments were recommended |
| | | Amendments were recommended |
| | | Significant amendments were recommended |

## I. Summary:

The bill saves from repeal the public-records exemption under section 744.7042(6), Florida Statutes, for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office. The exemption currently is scheduled for repeal on October 2, 2011, unless retained by the Legislature following a review under the Open Government Sunset Review Act.

The bill makes organizational and clarifying changes.

This bill repeals section 2 of chapter 2006-179, Laws of Florida.

## II. Present Situation:

### Florida's Public-Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In

1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Section 24(a), art. I, of the State Constitution, provides that:

> Every person 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. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public-Records Act is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record[1] must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency[2] records are to be available for public inspection.

The Florida Supreme Court has interpreted the definition of "public record" to encompass all materials made or received by an agency in connection with official business which are "intended to perpetuate, communicate, or formalize knowledge."[3] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[4]

Only the Legislature is authorized to create exemptions from open government requirements.[5] 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.[6] A bill enacting an exemption may not contain other substantive provisions, although it may contain multiple exemptions relating to one subject.[7]

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[1] Section 119.011(12), F.S., defines "public records" to include "all documents, papers, letters, maps, books, tapes, photographs, film, 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."

[2] Section 119.011(2), F.S., defines "agency" as "any state, county, district, authority, or municipal officer, department, division, 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."

[3] *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

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

[5] Article I, s. 24(c) of the State Constitution.

[6] *Memorial Hospital-West Volusia, Inc. 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).

[7] Article I, s. 24(c) of the State Constitution.

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.[8] If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[9]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[10] provides for the systematic review of an exemption from the Public-Records Act in the fifth year after its enactment.[11] The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.[12] 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.[13] An exemption meets the statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects 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 the safety of such individuals; or
- 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 would injure the affected entity in the marketplace.[14]

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.[15]

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.[16] 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

[8] Attorney General Opinion 85-62, August 1, 1985.
[9] *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So. 2d 289 (Fla. 1991).
[10] Section 119.15, F.S.
[11] Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a substantially amended exemption if the exemption is expanded to cover additional records. As with a new exemption, a substantially amended exemption is also subject to the five-year review.
[12] Section 119.15(6)(b), F.S.
[13] *Id*.
[14] *Id.*
[15] Section 119.15(6)(a), F.S.
[16] Article I, s. 24(c) of the State Constitution.

exemption is created,[17] then a public necessity statement and a two-thirds vote for passage are not required.

**Guardianship**

In 2006, the Florida Legislature significantly revised guardianship laws.[18] A guardian is a court-appointed surrogate decision-maker to make personal or financial decisions for a minor or for an adult with mental or physical disabilities. Section 744.102(4), F.S., defines "guardian" to mean a person who has been appointed by the court to act on behalf of a ward's person or property or both. A ward is defined as a person for whom a guardian has been appointed.[19]

The Statewide Public Guardianship Office appoints local public guardian offices, as required by s. 744.703, F.S., to provide guardianship services when persons do not have adequate income or assets to afford a private guardian and there is no willing relative or friend to serve. The Statewide Public Guardianship Office annually registers professional guardians[20] and reviews and approves instruction and training for professional guardians.[21] The Statewide Public Guardianship Office has authority to administer the Joining Forces for Public Guardianship grant program.[22]

**Public-Records Exemption for Donors' Identifying Information**

The Legislature created public-records exemption for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office. Section 744.7082(6), F.S., provides that the identity of a donor or a prospective donor of money or property to the direct-support organization who wishes to remain anonymous, as well as all information identifying the donor or prospective donor, is confidential and exempt from the public-records law.

The Foundation for Indigent Guardianship (FIG or foundation) serves as the direct-support organization for the Statewide Public Guardianship Office and was incorporated in December 2005.[23] The foundation is a not-for-profit corporation that is organized and operated to conduct programs and activities; to raise funds; to request and receive grants, gifts, and bequests of moneys; to acquire, receive, hold, invest, and administer, in its own name, securities, funds, objects of value, or other property, real or personal; and to make expenditures to or for the direct or indirect benefit of the Statewide Public Guardianship Office.[24]

The foundation is operated by a board of directors that meets monthly. The foundation has established the State of Florida Public Guardianship Pooled Special Needs Trust. The trust is marketed by the foundation, and the trust is the foundation's primary vehicle for fundraising.

[17] An example of an exception to a public-records exemption would be allowing another agency access to confidential or exempt records.
[18] See ch. 2006-178, Laws of Fla.
[19] Section 744.102(22), F.S.
[20] Section 744.1083, F.S.
[21] Section 744.1085(3), F.S.
[22] See section 744.712, F.S., this grant program has not yet been funded.
[23] Department of Elderly Affairs Statewide Public Guardianship Office.
[24] Section 744.7082(1), F.S.

The foundation retains funds it receives upon the death of a beneficiary of the trust.

The funds that the foundation raises supplement the budgets of the contracted public guardianship offices. In consultation with the Statewide Public Guardianship Office, the foundation awards one-time grants to the local public guardianship offices throughout the state upon its receipt of retained funds from the trust. The foundation also participates in other outreach activities, such as submitting articles for publication in local media and participating in local community events to raise awareness of the Statewide Public Guardianship Office.

Public-records exemptions for the identities of donors or prospective donors who desire anonymity are comparatively common under the Florida Statutes.[25] The exemption provided to the foundation, the direct support organization for the Statewide Public Guardianship Office, affects donors or prospective donors of the foundation who desire to remain anonymous. The confidentiality applies to any record revealing the identity of such donors. This exemption is scheduled to expire on October 2, 2011, unless saved from repeal by the Legislature after a review under the Open Government Sunset Review Act, which was conducted by the Committee on Judiciary during the 2010-2011 legislative interim period.

Research from the review demonstrates that the public-records exemption enables the foundation to effectively and efficiently administer its fundraising activities on behalf of the local public guardianship offices that contract with the Statewide Public Guardianship Office to provide guardianship services. To the extent that donors might be dissuaded from contributing to the foundation in the absence of the public-records exemption, the ability of the foundation to raise funds would be limited. The authorizing statute for the foundation as a direct-support organization for the Statewide Public Guardianship Office provides that one of the foundation's purposes is to raise funds and receive gifts and property.

It is possible that a future donor to the foundation might desire anonymity. If the public-records exemption was not in place and a donor requested anonymity, the foundation could be forced to forgo or postpone the donation and request a public-records exemption from the Legislature.

According to staff of the Statewide Public Guardianship Office, there has been one corporate donor providing funds to the foundation, and it has no documented requests for anonymity. The foundation has not been directly soliciting donors for contributions other than the marketing of the State of Florida Public Guardianship Pooled Special Needs Trust. The foundation's board is developing a policy for a process by which a donor may request anonymity.

The Statewide Public Guardianship Office has indicated in response to a questionnaire that the public-records exemption is needed to protect the identity of donors participating in the foundation's trust because if the anonymity of the donors cannot be guaranteed, an individual may choose to donate to a trust or other charity that is not subject to such disclosures. The Statewide Public Guardianship Office has stated that the foundation is in the process of adopting

[25] *See, e.g.*, Enterprise Florida, Inc. (s. 11.45(3)(i), F.S.); Cultural Endowment Program (s. 265.605(2), F.S.); Publicly owned house museum designated as a National Historic Landmark (s. 267.076, F.S.); direct-support organizations for University of West Florida (s. 267.1732(8), F.S.); direct-support organization for University of Florida (s. 267.1736, F.S.); Florida Tourism Industry Marketing Corporation (s. 288.1226(6), F.S.); direct-support organization for Office of Tourism, Trade and Economic Development (s. 288.12295, F.S.); and Florida Intergovernmental Relations Foundation (s. 288.809(4), F.S.).

a plan to expand its fundraising efforts and that it would be in the foundation's best interest to be able to offer anonymity to those prospective donors who desire it. The Statewide Public Guardianship Office additionally has stated that future fundraising efforts may be hampered if the identities of its donors were made public.

Based on the research conducted as part of the Open Government Sunset Review, professional staff of the Committee on Judiciary recommends that the Legislature reenact the public-records exemption in s. 744.7082(6), F.S., which makes the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office exempt from disclosure. The exemption enables the foundation to effectively administer its programs, and thereby satisfies one of the recognized criteria for retaining an exemption as prescribed in the Open Government Sunset Review Act.[26]

## III. Effect of Proposed Changes:

Section 744.7082(6), F.S., provides that the identity of a donor or a prospective donor of money or property to the direct-support organization affiliated with the Statewide Public Guardianship Office, who wishes to remain anonymous, as well as all information identifying the donor or prospective donor, is confidential and exempt from the public-records law. Under section 2 of chapter 2006-179, Laws of Florida, this public-records exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill repeals section 2 of chapter 2006-179, Laws of Florida, and thus saves the public-records exemption from repeal under the Open Government Sunset Review Act.

The bill makes organizational and clarifying changes.

The bill provides an effective date of October 1, 2011.

**Other Potential Implications**:

If the Legislature chooses not to retain the public-records exemption for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office, the exemption will expire on October 2, 2011. Without the exemption, the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office will become public.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[26] Section 119.15(6)(b), F.S.

B. Public Records/Open Meetings Issues:

The bill repeals section 2 of chapter 2006-179, Laws of Florida, and saves the public-records exemption under subsection 744.7042(6), F.S., for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office from repeal under the Open Government Sunset Review Act. This legislation is not expanding the public records exemption under review to include more records; therefore, a two-thirds vote is not necessary.[27]

C. Trust Funds Restrictions:

None.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Governmental Oversight and Accountability on March 23, 2011:**
Makes organizational and clarifying changes.

B. Amendments:

None.

[27] Article I, s. 24(c) of the State Constitution requires legislation creating a public-records exemption to pass by a two-thirds vote of each house in the Legislature.

**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.)

Prepared By: The Professional Staff of the Rules Committee

| | |
|---|---|
| BILL: | CS/SB 600 |
| INTRODUCER: | Governmental Oversight and Accountability Committee and Criminal Justice Committee |
| SUBJECT: | OGSR/Certain Specified Personal Information of DJJ Direct Care Employees |
| DATE: | April 1, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Dugger | Cannon | CJ | **Favorable** |
| 2. | Naf | Roberts | GO | **Fav/CS** |
| 3. | Naf | Phelps | RC | **Pre-meeting** |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## Please see Section VIII. for Additional Information:

| | | |
|---|---|---|
| A. COMMITTEE SUBSTITUTE..... | X | Statement of Substantial Changes |
| B. AMENDMENTS..... | | Technical amendments were recommended |
| | | Amendments were recommended |
| | | Significant amendments were recommended |

## I. Summary:

This bill is the result of an Open Government Sunset Review performed by the Committee on Criminal Justice.

Current law[1] provides that certain personal identifying and locating information of current or former specified direct care employees of the Department of Juvenile Justice (DJJ), their spouses, and their children is exempt from public-records requirements. This exemption is subject to review under the Open Government Sunset Review Act[2] and will sunset on October 2, 2011, unless saved from repeal through reenactment by the Legislature. This bill reenacts the exemption.

The bill also updates the position titles of protected employees to reflect position title reclassifications.

[1] Section 119.071(4)(d)1.i., F.S.
[2] Section 119.15, F.S.

This bill does not expand the scope of the public-records exemption and therefore does not require a two-thirds vote of each house of the Legislature for passage.

This bill amends section 119.071(4)(d)1.i., Florida Statutes.

## II. Present Situation:

**Florida's Public-Records Laws**

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Paragraphs (a) and (c) of Section 24, Art. I of the State Constitution provide the following:

> (a) Every person has the right to inspect or copy any public records 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. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.
>
> (c) This section shall be self-executing. The Legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b); provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader then necessary to accomplish the state purpose of the law…..Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) and (b) and provisions governing the enforcement of this section, and shall relate to one subject.

Florida's public-records law is contained in ch. 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record[3] must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under

[3] s. 119.011(1), F.S., defines "public record" to include "all documents, papers, letters, maps, books, tapes, photographs, film, 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."

supervision by the custodian of the public record. Unless specifically exempted, all agency[4] records are to be available for public inspection.

Section 119.011(12), F.S., defines the term "public record" 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 official business by any agency. 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 "intended to perpetuate, communicate, or formalize knowledge."[5] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[6]

Only the Legislature is authorized to create exemptions to open-government requirements.[7] 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.[8] A bill enacting an exemption[9] may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.[10]

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.[11] If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[12]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[13] provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.[14] An identifiable public purpose is served if the exemption meets one of three specified criteria and if the

[4] s. 119.011(2), F.S., defines "agency" as "…any state, county, district, authority, or municipal officer, department, division, 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."
[5] *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640(Fla. 1980).
[6] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979)
[7] Article I, s. 24(c) of the State Constitution.
[8] *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).
[9] s. 119.15, F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.
[10] Article 1, s. 24(c) of the State Constitution.
[11] Attorney General Opinion 85-62, August 1, 1985.
[12] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d. 289 (Fla.1991).
[13] Section 119.15, F.S.
[14] Section 119.15(6)(b), F.S.

Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.[15] An exemption meets the statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects 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 the safety of such individuals; or
- 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 … would injure the affected entity in the marketplace.[16]

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.[17]

**Current Exemptions in Section 119.071(4)(d), F.S., Pertaining to Agency Personnel**

Section 119.071(4)(d), F.S., currently provides public-records exemptions for specified personal identifying and locating information of the following current and former agency personnel, as well as for specified personal identifying and locating information of their spouses and children:
- Law enforcement and specified agency investigative personnel;
- Certified firefighters;
- Justices and judges;
- Local and statewide prosecuting attorneys;
- Magistrates, administrative law judges, and child support hearing officers;
- Local government agency and water management district human resources administrators;
- Code enforcement officers;
- Guardians ad litem;
- Specified Department of Juvenile Justice personnel; and
- Public defenders and criminal conflict and civil regional counsel.

Although there is some inconsistency among the types of information that are exempted, the following information is protected in all of the above-listed exemptions:
- The home addresses and telephone numbers of the agency personnel;
- The home addresses, telephone numbers, and places of employment of the spouses and children of the agency personnel; and
- The names and locations of schools and day care facilities attended by the children of the agency personnel.

[15] *Id.*
[16] *Id.*
[17] Section 119.15(6)(a), F.S.

**Exemption Under Review**

The public-records exemption under review[18] makes the following information exempt from s. 119.07(1), F.S. and s. 24(a), Art. I of the State Constitution:

- The home addresses, telephone numbers, and photographs of current or former:
  - Juvenile probation officers,
  - Juvenile probation supervisors,
  - Detention superintendents,
  - Assistant detention superintendents,
  - Senior juvenile detention officers,
  - Juvenile detention officer supervisors,
  - Juvenile detention officers,
  - House parents I and II,
  - House parent supervisors,
  - Group treatment leaders,
  - Group treatment leader supervisors,
  - Rehabilitation therapists, and
  - Social services counselors.
- The names, home addresses, telephone numbers, and places of employment of spouses and children of such personnel.
- The names and locations of schools and day care facilities attended by the children of such personnel.

Based upon the Open Government Sunset Review of the exemption, professional staff of the Senate Committee on Criminal Justice recommended that the Legislature retain the public-records exemption established in s. 119.071(4)(d)1.i., F.S. This recommendation was made in light of information gathered for the Open Government Sunset Review, which indicates that there is a public necessity to continue to protect personal identifying and locating information of specified DJJ personnel and their families because disclosure would jeopardize their safety.[19]

## III. Effect of Proposed Changes:

This bill removes the repeal date, thereby reenacting the public-records exemption under review.

It also amends the exemption to update the position titles of protected employees to reflect position title reclassifications by DJJ. The updated position titles are as follows:

- Juvenile probation officers,
- Juvenile probation supervisors,

[18] Section 119.071(4)(d)1.i., F.S.

[19] According to DJJ staff, the exempt records contain information that is of a sensitive, personal nature concerning those DJJ employees who have direct contact and provide care and supervision to juvenile offenders. DJJ staff state that it is paramount to the safety of these employees and their families that their personal information remain exempt. Direct care employees and their families are subject to the same risk of threats and reprisals from juveniles, their families, and gang members as those personnel who work in law enforcement, corrections, and the court system. Additionally, DJJ staff assert that providing easier access to the employee's personal identifying information will interfere with the department's administration of the juvenile justice system by jeopardizing the workplace safety of its employees. Information gathered for this Open Government Sunset Review is on file with the Senate Committee on Criminal Justice.

- Detention superintendents,
- Assistant detention superintendents,
- Juvenile justice detention officers I and II,
- Juvenile justice detention officer supervisors,
- Juvenile justice residential officers,
- Juvenile justice residential officer supervisors I and II,
- Juvenile justice counselors,
- Juvenile justice counselor supervisors,
- Human services counselor administrators,
- Senior human services counselor administrators,
- Rehabilitation therapists, and
- Social services counselors.

The bill specifies an effective date of October 1, 2011.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill reenacts and amends an existing public-records exemption specified in s. 119.071(4)(d)1.i., F.S. The bill does not expand the scope of the exemption and therefore does not require a two-thirds vote of each house of the Legislature for passage.

C. Trust Funds Restrictions:

None.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Governmental Oversight and Accountability on March 23, 2011:**
Provides DJJ employees with protection equal to that of other agency employees with personal identifying information exemptions by removing a requirement that DJJ employees provide a written statement that they have made reasonable efforts to protect the exempted information from being accessible through other means available to the public.

B. Amendments:

None.

**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.)

Prepared By: The Professional Staff of the Rules Committee

| | |
|---|---|
| BILL: | SB 602 |
| INTRODUCER: | Criminal Justice Committee |
| SUBJECT: | OGSR/Biometric Identification Information |
| DATE: | April 1, 2011 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Erickson | Cannon | CJ | **Favorable** |
| 2. | Naf | Roberts | GO | **Favorable** |
| 3. | Naf | Phelps | RC | **Pre-meeting** |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

Section 119.071(5)(g), F.S., exempts from public inspection or copying biometric identification information held by an agency before, on, or after the effective date of the exemption (July 1, 2006).[1] Biometric identification information consists of any record of friction ridge detail, fingerprints, palm prints, and footprints.

This exemption is subject to review under s. 119.15, F.S., the Open Government Sunset Review Act, and will sunset on October 2, 2011, unless saved from repeal through reenactment by the Legislature. The bill reenacts the exemption. The bill does not expand the scope of the existing public records and meetings exemptions, so it does not require a two-thirds vote.

This bill reenacts section 119.071(5)(g) of the Florida Statutes.

## II. Present Situation:

### Constitutional Requirements Regarding Public Records

Article I, section 24 of the Florida Constitution, as it relates to records, provides that every person has the right to inspect or copy any public record that is 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 the Florida Constitution. This section is self-executing. The Legislature, however, may provide by general law passed by a two-thirds vote of each house for the

[1] Section 3, ch. 2006-181, L.O.F.

exemption of records from the requirements of this section provided such law: (1) states with specificity the public necessity justifying the exemption and is no broader than necessary; (2) contains only exemptions from the requirements of this section and provisions governing the enforcement of this section; and (3) relates to one subject. A bill enacting an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.

The Legislature is also required by this section to enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the Legislature may adopt rules governing enforcement of this section in relation to records of the legislative branch.

**The Public Records Act**

The Public Records Act[2] 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:

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

Unless specifically exempted, all agency[3] 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.[4]

The Florida Supreme Court has interpreted this definition to encompass "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type."[5]

There is a difference between records the Legislature has made exempt from public inspection and those made confidential and exempt. If the Legislature makes a record confidential and exempt, the exempted record may not be released by an agency to anyone other than to the persons or entities designated by law.

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[2] Chapter 119, F.S.
[3] The term "agency" is defined in s. 119.011(2), F.S., to mean "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."
[4] Section 119.011(12), F.S.
[5] *Shevin v. Byron, Harless, Schaffer, Reid and Assocs., Inc.*, 379 So.2d 633, 640 (Fla.1980).

**The Open Government Sunset Review Act**

Section 119.15, F.S., the Open Government Sunset Review Act, establishes a process for the review and repeal or reenactment of public records exemptions. The act provides that in the fifth year after enactment of a new exemption or substantial amendment[6] of an existing exemption, the exemption is repealed on October 2nd of the fifth year, unless the Legislature reenacts the exemption.[7] An exemption may be created, revised, or maintained only if it serves an identifiable public purpose and is no broader than necessary to meet the public purpose it serves.[8] An identifiable public purpose is served if the exemption meets one the following purposes and 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:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects 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;[9] or
- Protects 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.[10]

The Legislature must also consider the following as part of the sunset review process:

- 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 so, 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?[11]

[6] 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. s. 119.15(4)(b), F.S.
[7] Section 119.15(3), F.S.
[8] Art. I, s. 24(c), Fla. Const; s. 119.15(6), F.S.
[9] Only information that would identify the individuals may be exempted for this purpose.
[10] Section 119.15(6)(b), F.S.
[11] Section 119.15(6)(a), F.S.

**Biometric Identification Exemption (s. 119.071(5), F.S.)**

In 2006, the Legislature created s. 119.071(5)(g), F.S.,[12] which exempts from public inspection or copying biometric identification information held by an agency before, on, or after the effective date of this exemption (July 1, 2006).[13] Biometric identification information consists of any record of friction ridge detail, fingerprints, palm prints, and footprints.

The Legislature provided the following statement of public necessity for enacting the exemption:

> The Legislature finds that it is a public necessity that biometric identification information held by an agency before, on, or after the effective date of this exemption be made exempt from public records requirements. Biometric identification information is used to verify the identity of persons and by its very nature involves matters uniquely related to individual persons. The use of multiple methods of biometric identification is a growing technology in detecting and solving crime, in preventing identity theft, and in providing enhanced levels of security in agency and other operations. Given existing technological capabilities for duplicating, enhancing, modifying, and transferring records, the availability of biometric identification information creates the opportunity for improper, illegal, or otherwise harmful use of such information. At the same time, use of biometric identification information by agencies is a useful and increasingly valuable tool. Thus, the Legislature finds that it is a public necessity to protect biometric identification information held by an agency before, on, or after the effective date of this act.[14]

Section 119.071(5)(g), F.S., stands repealed on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature. *The Florida Department of Law Enforcement (FDLE), one of the agencies most affected by retention or repeal of the exemption, recommends retention of the exemption. Senate professional staff concurs with this recommendation.*

The FDLE indicates that the identifiable public purpose or goal of the exemption in s. 119.071(5)(g), F.S., is to prevent fingerprints and other biometric identification information from being used for improper purposes, such as identity theft and fraud as well as security breaches.[15] Disclosure of the information also has the potential to hinder, compromise, or prevent criminal intelligence gathering, a criminal investigation, or a criminal prosecution, if the information were used, for example, to create phony or altered fingerprint cards or create false evidence of fingerprint impressions at a crime scene. The efficient and effective administration of the FDLE would be significantly impaired by public disclosure because the biometric

[12] Ch. 2006-181, L.O.F.
[13] Section 3, ch. 2006-181, L.O.F.
[14] Section 2, ch. 2006-181, L.O.F.
[15] Response of the FDLE to the *Senate Committee on Criminal Justice Open Government Sunset Review Questionnaire to the Florida Department of Law Enforcement*, dated September 22, 2010 (on file with the Senate Committee on Criminal Justice). All information in the remainder of the "Present Situation" section of this analysis is from this source, unless otherwise indicated.

identification information could be demanded for an unlawful purpose. An agency cannot inquire as to the purpose or proposed use for which an entity makes a public records request.

Persons most uniquely affected by the exemption (as opposed to the general public) are those persons whose fingerprints have been submitted to an agency for any reason, which includes arrest prints and applicant prints (i.e., criminal history background checks for employment, licensing, name change, sealing/expungement, eligibility, etc.). Other forms of biometric identification may be taken as latent lifts from a crime scene.

Fingerprints are taken and submitted to the FDLE by agencies and fingerprint scanning services. These fingerprints may be inked impressions or electronic submissions, which include applicant prints, arrest prints (from criminal justices agencies), or latent lifts from crime scenes.[16] Applicant prints are taken as required or authorized by law; arrest prints and latent lifts are taken as needed for criminal justice purposes. Arrest prints and, as authorized, applicant prints are stored in the Automated Fingerprint Identification System (AFIS) authorized under s. 943.05(2), F.S.[17]

The purposes for which the FDLE collects, receives, maintains, or shares the biometric identification information covered by the exemption include:

- Positive identification, usually against criminal records;
- Criminal justice or forensic purposes (e.g., latent lifts are compared to known standards for crime scene analysis and to identify unknown, missing, and deceased persons);
- Employment or licensing background checks; and
- As otherwise required by law (e.g., for comparison with criminal records).

The FDLE shares arrest prints and latent lifts with other criminal justice agencies (covered by the exemption) for criminal justice purposes. These receiving agencies also protect against public disclosure of the biometric identification information.

Other law enforcement agencies may retain copies of the fingerprints of persons the agencies have arrested or booked. Other criminal justice agencies which have local AFIS maintain arrest fingerprints. Crime scene fingerprints (and other biometric identification information) are collected and maintained as part of criminal investigations and may be shared with other agencies that engage in forensic identification as well as prosecution of criminal defendants. Courts may collect fingerprints to identify judgments in criminal cases.

Federal law prohibits public disclosure of the biometric identification information in s. 119.071(5)(g), F.S., to the extent such information is considered a part of a national criminal history record.[18]

[16] The FDLE indicates that the fingerprints and other biometric identification information are not readily obtainable by alternative means.
[17] Pursuant to s. 943.051(4), F.S., criminal history records must be based on fingerprints.
[18] Florida Attorney General Opinion 99-01 (January 6, 1999) and 28 C.F.R § 20.33.

According to the FDLE, the biometric identification information exempted pursuant to s. 119.07(5)(g), F.S., is also protected to a limited extent by s. 937.028(1), F.S., which applies only to "fingerprints [which] have been taken for the purpose of identifying a child, in the event a child becomes missing." Biometric identification information associated with a criminal investigation may be protected as active criminal investigative information under s. 119.07(2)(c)1., F.S. Arrest fingerprints which identify the subject of a criminal history record that has been expunged or sealed are confidential pursuant to s. 943.0585(4) and s. 943.059(4), F.S. The FDLE states that these described exemptions do not duplicate s. 119.07(5)(g), F.S., but serve different and distinct purpose. Consequently, these exemptions do not appear appropriate to merge.

Senate professional staff have reviewed these exemptions and other exemptions and none of them appear to be appropriate for merger or repeal (as clearly being duplicative of or completely subsumed within the exemption in s. 119.07(5)(g), F.S.).

## III. Effect of Proposed Changes:

The bill reenacts s. 119.071(5)(g), F.S., which exempts from public inspection or copying biometric identification information held by an agency before, on, or after the effective date of this exemption (July 1, 2006). The biometric identification information consists of the following information:

- Any record of friction ridge detail;
- Fingerprints;
- Palm prints; and
- Footprints.

The bill does not expand the scope of the existing public records and meetings exemptions, so it does not require a two-thirds vote of each house of the Legislature for passage.

The effective date of the bill is October 1, 2011.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

None.

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

Article I, section 24 of the Florida Constitution permits the Legislature to provide by general law for the exemption of open meetings and for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law.

If a reenactment of an exemption does not expand the scope of the exemption, it does not require a new repealer date, public necessity statement, or a two-thirds vote.[19] It is only when the exemption is expanded (i.e., more records are exempt, records are exempt for a longer period of time, etc.) that these three requirements come into play, because that is tantamount to creating a new exemption.

The reenactment of the exemption in s. 119.071(5)(g), F.S., does not expand the exemption.

C. Trust Funds Restrictions:

None.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.



[19] See Art. I, s. 24(c), Fla. Const., and s. 119.15, F.S.

**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.)

Prepared By: The Professional Staff of the Rules Committee

| | |
|---|---|
| BILL: | SB 2056 |
| INTRODUCER: | Rules Subcommittee on Ethics and Elections |
| SUBJECT: | OGSR/Commission on Ethics |
| DATE: | April 1, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Carlton | Roberts | EE | **Favorable** |
| 2. | Carlton | Phelps | RC | **Pre-meeting** |
| 3. | | | GO | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

The bill saves from repeal the exemption to the Florida Public Records Act[1] and the Florida Sunshine Law currently found in Section 112.3215(8)(d), F.S., relating to the confidentiality of certain records and meetings before the Commission on Ethics ("Commission"). Specifically, the provision subject to repeal exempts certain records relating to an audit or an investigation until the alleged violator requests in writing that such investigation and associated records and meetings be made public or until the Commission determines whether probable cause exists that a violation has occurred. Also, that Section exempts proceedings from the open meetings and notice requirements of the Sunshine Law found in Section 286.011, F.S.

Section 112.3215(8)(d), F.S., is scheduled for repeal on October 2, 2011, unless saved from repeal by the Legislature; pursuant to the requirements of the Open Government Sunset Review Act.

This bill amends Section 112.3215(8)(d), F.S., by removing the scheduled repeal date from the statute.

## II. Present Situation:

### Public Records

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892.[2]

[1] §119.07(1), F.S.; FLA. CONST. art. I., § 24(a).
[2] §§ 1390, 1391 F.S. (Rev. 1892).

In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.[3] Article I, s. 24(a), of the Florida Constitution, provides that:

> Every person 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. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act[4] 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:

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

Unless specifically exempted, all agency[5] 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.[6]

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.[7]

Only the Legislature is authorized to create exemptions to open government requirements.[8] Exemptions must be created by general law and such law must specifically state the public

[3] FLA. CONST. art. I, § 24.
[4] Chapter 119, F.S.
[5] The word "agency" is defined in s. 119.011(2), F.S., to mean "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."
[6] § 119.011(12), F.S.
[7] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).
[8] FLA. CONST. art. I, § 24(c).

necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[9] A bill enacting an exemption[10] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[11]

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. 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.[12] If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[13]

**Public Meetings**

Article I, s. 24(b), of the Florida Constitution, provides that:

> All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

Florida's Sunshine Law, s. 286.011, F.S., states that:

> All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

"The purpose of the Sunshine Law is 'to prevent at non-public meetings the crystallization of secret decisions to a point just short of ceremonial acceptance.'"[14] Having been "enacted in the public interest to protect the public from 'closed door' politics," the Sunshine Law is construed liberally by the courts in favor of open government so as to frustrate all evasive devices.[15] The law has been held to apply only to a meeting of two or more public officials at which decision

[9] *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567, 569-570 (Fla. 1999).
[10] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.
[11] FLA. CONST. art. I, § 24(c).
[12] Attorney General Opinion 85-62.
[13] *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), review denied, 589 So.2d 289 (Fla. 1991).
[14] *Zorc v. City of Vero Beach*, 722 So. 2d 891 (Fla. 4th DCA 1998) (quoting *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974)); See also *Monroe County v. Pigeon Key Historical Park, Inc*., 647 So. 2d 857, 860 (Fla. 3d DCA 1994).
[15] *Wood v. Marston*, 442 So. 2d 934, 938, 940 (Fla. 1983).

making of significance, as opposed to fact finding or information gathering, will occur.[16] Two or more public officials subject to the Sunshine Law may interview others privately concerning the subject matter of the entity's business, or discuss among themselves in private those matters necessary to carry out the investigative aspects of the entity's responsibility; but at the point where the public officials make decisions, such discussion must be conducted at a public meeting, following notice.[17]

**Open Government Sunset Review Act**

The Open Government Sunset Review Act[18] 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 2 of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

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:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects 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.
- Protects trade or business secrets.[19]

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 so, 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?[20]

Pursuant to Section 119.10(1)(a), F.S., any public officer who violates any provision of the Public Records Act is guilty of a noncriminal infraction, punishable by a fine not to exceed $500. Further, under paragraph (b) of that subsection, a public officer who knowingly violates the provisions of Section 119.07(1), F.S., relating to the right to inspect public records, commits a first-degree misdemeanor, and is subject to suspension and removal from office or impeachment.

[16] *City of Sunrise v. News and Sun-Sentinel Co*., 542 So. 2d 1354 (Fla. 4th DCA 1989); See also *Florida Parole and Probation Commission v. Thomas*, 364 So. 2d 480 (Fla. 1st DCA 1978); *Bennett v. Warden*, 333 So. 2d 97, 99-100 (Fla. 2d DCA 1976); and *Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222, 224-225 (Fla. 5th DCA 1985).
[17] *Florida Parole and Probation Commission v. Thomas*, 364 So. 2d 480 (Fla. 1st DCA 1978).
[18] § 119.15, F.S.
[19] § 119.15(6)(b), F.S.
[20] § 119.15(6)(a), F.S.

Any person who willfully and knowingly violates any provision of the chapter is guilty of a first-degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding $1,000.

**Section 112.3215(8)(d), F.S.**
The Florida Public Records Act provides that "all exemptions from disclosure [be] construed narrowly and [be] limited to their designated purpose."[21] Exemptions to the open public meeting requirement under Florida's Sunshine Law[22] must also be narrowly construed.[23] Section 112.3215(8)(d), F.S., exempts from the Florida Public Records Act records that pertain to an audit of a lobbying firm's or principal's compensation report or records. Generally, compensation-reporting audits consist of a review of a lobbying firm's compensation report filed with the Commission in order to ensure their accuracy.[24] Section 112.3215(8)(d), F.S., also exempts records relating to an investigation of a complaint alleging that a lobbyist, lobbying firm, or principal of a lobbyist has failed to register, has failed to submit a compensation report, or has knowingly submitted false information in any report or registration required by Section 112.3215, F.S., or Section 112.32155, F.S. The information protected by the exemption may be released to the public when either the affected lobbying firm requests that the records and meetings be made public or the Commission finds probable cause that "the audit reflects a violation of the reporting laws."[25]

Section 112.3215(8)(d), F.S., also provides that meetings held pursuant to such an investigation or at which such an audit is discussed are exempt from Florida's Sunshine Law found in Section 286.011, F.S., and s. 24(b), Art. I of the State Constitution. Thus, a meeting wherein the Commission is considering an audit or investigation conducted pursuant to Section 112.3215, F.S., is not open to the public and no notice to the public is required.

In conjunction with Section 112.3215(8)(d), F.S., Rule 34-12.760, F.A.C., provides further guidelines for the Commission on what matters must remain confidential and exempt from public records requirements. Pursuant to the requirements of Rule 34-12.760(2), F.A.C., the Commission must also release the complaint, the report of the investigation, and the Commission's order if there was no finding of probable cause that a violation occurred but the rest of the file and the investigative file remain confidential. If the Commission does determine probable cause exists that a violation has occurred, all of the documents pertaining to the complaint – including the investigative file – become public record upon the filing of the Commission's order.[26] The complaint along with the recommendation of the Commission's executive director and the Commission's order become public record if a complaint is dismissed without an investigation.[27]

[21] *Barfield v. City of Fort Lauderdale Police Dept*., 639 So. 2d 1012, 1014 (Fla. 4th DCA 1994).
[22] §286.011, F.S.
[23] *See Bruckner v. City of Dania Beach*, 823 So. 2d 167, 170 (Fla. 4th DCA 2002); *see also Zorc*, *supra* note 14, at 897.
[24] *See* §112.3215(5)(a)1 (requiring lobbying firms to file a compensation report with the commission for each quarter in which one or more of the firm's lobbyists were registered to represent a principal).
[25] §112.3215(8)(d), F.S; *see also* Rule 34-12.760(2), F.A.C.
[26] Rule 34-12.760(3), F.A.C.
[27] Rule 34-12.760(1), F.A.C.

The exemption in Section 112.3215(8)(d), F.S., is subject to the Open Government Sunset Review Act and is scheduled to be repealed on October 2, 2011, unless the Legislature reenacts the exemption pursuant to the requirements of Section 119.15, F.S.

## III. Effect of Proposed Changes:

The bill saves from repeal the exemption found in Section 112.3215(8)(d), F.S. Section 1 of the bill reenacts the current public records and public meeting exemption found in Section 112.3215(8)(d), F.S.

The current exemption may be maintained as the public necessity that warranted the original 2005 legislation continues to exist. Requiring the disclosure of compensation audit reports of lobbyists through open records requests or public meetings could irreparably injure lobbying firms by providing competitors with detailed information about a firm's financial status. As a result, disclosure would create an economic disadvantage for such firms and possibly hinder a firm's reputation if no violations were found. Additionally, public disclosure of records and meetings could jeopardize the commission's ability to conduct investigations. No other exemption protects records or meetings of this nature; and there is no other existing exemption where it would be appropriate to merge with the exemptions found in this bill. Due to the still-existing public necessity, the benefits of maintaining the exemption outweigh any public benefit that may be received by requiring disclosure.

As precedent establishes, all public records and public meetings exemptions must be narrowly construed.[28] With the exemptions in section 112.3215(8)(d), F.S., being narrowly constructed as Florida law provides, it does not compromise the goals of the Florida Public Records Act or the Florida Sunshine Law. While the current language of the statute exempts an entire meeting at which an investigation or audit is discussed, any exemptions are construed narrowly. In narrowly construing the exemptions to the Public Records Act and the Sunshine Law, it is the practice of the Commission to take up a confidential matter on the executive session agenda with other confidential matters only. Section 112.3215(8)(d), F.S., does not impede the Public Records Act's or Sunshine Law's goals of preventing the "crystallization of secret decisions."[29] With the public necessity, the narrow construction of the exemptions, and the additional requirements established Rule 34-12.760, F.A.C., adequate public oversight is provided so that it does not contravene the public policy goals of the Public Records Act or the Sunshine Law.

Section 2 provides an effective date of October 1, 2011.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[28] *See supra* notes 21 and 23.
[29] *Zorc*, *supra* note 14, at 896.

B. Public Records/Open Meetings Issues:

As the bill does not create or expand a public records or public meetings exemption, a two-thirds vote for passage is not required.[30]

C. Trust Funds Restrictions:

None.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.



[30] FLA. CONST. art. I, § 24(c).

**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.)

Prepared By: The Professional Staff of the Rules Committee

| | |
|---|---|
| BILL: | CS/SB 670 |
| INTRODUCER: | Judiciary Committee and Senator Joyner |
| SUBJECT: | Powers of Attorney |
| DATE: | April 1, 2011 |
| REVISED: | |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Munroe | Maclure | JU | **Fav/CS** |
| 2. | Arzillo | Burgess | BI | **Favorable** |
| 3. | Arzillo | Phelps | RC | **Pre-meeting** |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## Please see Section VIII. for Additional Information:

| | | |
|---|---|---|
| A. COMMITTEE SUBSTITUTE..... | X | Statement of Substantial Changes |
| B. AMENDMENTS..... | | Technical amendments were recommended |
| | | Amendments were recommended |
| | | Significant amendments were recommended |

## I. Summary:

The bill seeks to conform Florida's power of attorney law under chapter 709, Florida Statutes, to the Uniform Power of Attorney Act,[1] with some modifications to achieve greater consistency among state laws.

The bill creates part I of ch. 709, F.S., consisting of ss. 709.02-709.07, F.S., titled "Powers of Appointment." The bill creates part II of ch. 709, F.S., consisting of ss. 709.2101-709.2402, F.S., titled "Powers of Attorney."

The revised power of attorney law applies only to powers of attorney created by an individual. Powers of attorney validly executed under Florida law before the effective date this bill will remain valid. If the power of attorney is durable[2] or springing,[3] it will remain durable or springing under the new law. To be effective in Florida, powers created on or after the effective date of this bill must be exercisable as of the time they are executed. The meaning and

[1] *See* National Conference of Commissioners on Uniform State Laws, A Few Facts About the Uniform Power of Attorney Act, http://www.nccusl.org/Act.aspx?title=Power%20of%20Attorney (last visited Mar. 9, 2011).
[2] Power of attorney which is not terminated by the principal's incapacity.
[3] Power of attorney which does not take effect until the principal loses capacity.

effectiveness of a power of attorney is governed by part II of ch.709, F.S. A power of attorney executed in another state that does not comply with the execution requirement of this part (part II of ch. 709, F.S.) is valid in Florida only if the execution of the power of attorney complied with the law of the state of execution.

Powers of attorney that are executed after the effective date of part II of ch. 709, F.S., may not create springing powers, with an exception for military powers. Qualified agents as defined in the bill are entitled to reasonable compensation. The revised power of attorney provides requirements for written notice with special notice for financial institutions, and special rules for banking and investment transactions; provides default duties for the agent; creates co-agents and successor agents; prohibits blanket or default powers granted to an agent; prescribes requirements for the rejection by a third person of power of attorney; prescribes requirements for an agent's liability under power of attorney; and provides grounds for judicial relief and dealing with conflicts of interest.

This bill creates the following sections of the Florida Statutes: 709.2101, 709.2102, 709.2103, 709.2104, 709.2105, 709.2106, 709.2107, 709.2108, 709.2109, 709.2110, 709.2111, 709.2112, 709.2113, 709.2114, 709.2115, 709.2116, 709.2117, 709.2118, 709.2119, 709.2120, 709.2121, 709.2201, 709.2202, 709.2208, 709.2301, 709.2302, 709.2303, 709.2401, and 709.2402.

The bill amends section 736.0602, Florida Statutes. The bill repeals the following sections of the Florida Statutes: 709.01, 709.015, 709.08, and 709.11.

## II. Present Situation:

A power of attorney is a legal document that delegates authority from one person to another.[4] The person who creates a power of attorney is the principal, and the person to whom the authority to act is delegated is an agent of the principal. The power of attorney is an important document because it allows one person to legally act for another, and it benefits and binds the principal as if the principal had done the act himself or herself. A durable power of attorney is power of attorney that continues to be legally effective if the principal becomes incapacitated.[5] Durable powers of attorney are often used in estate planning as an alternative to guardianship if a principal becomes incapacitated.[6]

In 2006, the Uniform Law Commission of the National Conference of Commissioners on Uniform State Laws completed a Uniform Power of Attorney Act.[7] Since that time, nine states (Colorado, Idaho, Indiana, Maine, Maryland, Nevada, New Mexico, Virginia, and Wisconsin) and one United States territory (U.S. Virgin Islands) have adopted the Uniform Power of Attorney Act.[8]

[4] *See* ch. 709, F.S.
[5] *See* s. 709.08, F.S.
[6] Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Chapter 709, F.S. (2011) (on file with the Senate Committee on Judiciary).
[7] See National Conference of Commissioners on Uniform State Laws, *supra* note 1.
[8] *Id.*

A committee was formed in Florida to evaluate the Uniform Power of Attorney Act for possible enactment in Florida.[9] The committee included attorneys with practices in various disciplines, including estate planning, estate and trust litigation, elder law, and family law, and attorneys who work for financial institutions, who represent the Florida Bankers Association and attorneys whose practice is comprised of real estate title insurance.[10] The committee recommended significant revisions to ch. 709, F.S., to propose the creation of a new part I to reinstate without substantive change those current provisions of ch. 709, F.S., relating to "powers of appointment" and a new part II of ch. 709, F.S., relating to "powers of attorney."[11]

## III. Effect of Proposed Changes:

The bill seeks to conform Florida's power of attorney law under ch. 709, F.S., to the Uniform Power of Attorney Act, with some modifications to achieve greater consistency among state laws. The bill creates part I of ch. 709, F.S., consisting of ss. 709.02-709.07, F.S., titled "Powers of Appointment." The bill creates part II of ch. 709, F.S., consisting of ss. 709.2101-709.2402, F.S., titled "Powers of Attorney."

The revised power of attorney law applies only to powers of attorney created by an individual. Powers of attorney validly executed under Florida law before the effective date of the new Florida powers of attorney law will remain valid. If the power of attorney is durable[12] or springing,[13] it will remain durable or springing under the new law. To be effective in Florida, powers created on or after the effective date of the new power of attorney law must be exercisable as of the time they are executed. The meaning and effectiveness of a power of attorney is governed by part II of ch. 709, F.S., if the power of attorney is used in Florida or states that it is to be governed by Florida law. A power of attorney executed in another state that does not comply with the execution requirement of this part (part II of ch. 709, F.S.) is valid in Florida if the execution of the power of attorney complied with the law of the state of execution.[14] The revised power of attorney law provides: requirements for written notice with special notice for financial institutions; special rules for banking and investment transactions; and default duties for the agent. The revised power of attorney law: creates co-agents and successor agents; prohibits blanket or default powers granted to an agent; outlines requirements for the rejection by a third person of power of attorney; specifies requirements for an agent's liability under power of attorney; and provides grounds for judicial relief and dealing with conflicts of interest.

**Section-by-Section Analysis**

**Section 1** creates part I of ch. 709, F.S., consisting of ss. 709.02-709.07, F.S., titled "Powers of Appointment."

[9] Real Property, Probate and Trust Law Section of the Florida Bar, *supra* note 4.
[10] *Id.*
[11] *Id.*
[12] *See* note 2.
[13] *See* note 3.
[14] This concept of portability makes powers of attorney portable between states. See Real Property, Probate and Trust Law Section of the Florida Bar, *supra* note 4.

**Section 2** creates part II of ch. 709, F.S., consisting of ss. 709.2101-709.2402, F.S., titled "Powers of Attorney."

**Section 3** creates s. 709.2101, F.S., which provides for the "Florida Power of Attorney Act."

**Section 4** creates s. 709.2102, F.S., which provides definitions.

"Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise, and the term includes an original agent, co-agent, and successor agent.

"Durable" means, with respect to a power of attorney, not terminated by the principal's incapacity.

"Electronic" means technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

"Financial institution" has the same meaning as in s. 655.005, F.S., relating financial institutions.

"Incapacity" means the inability of an individual to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income.[15]

"Knowledge" means a person has actual knowledge of the fact, has received a notice or notification of the fact, or has reason to know the fact from all other facts and circumstances known to the person at the time in question. With respect to an organization operating through employees, the organization has notice of or knowledge of a fact involving the power of attorney only from the earlier of the time the information was received by an employee having responsibility to act on matters involving the power of attorney or the time the information would have been brought to the employee's attention if the organization had exercised reasonable diligence. The term is substantively identical to the definition of the term in the Florida Probate Code.[16]

"Power of Attorney" means a writing that grants authority to an agent to act in the place of the principal, whether or not that the term is used in the writing. An act performed by an agent pursuant to a power of attorney has the same effect and benefit to the principal and the principal's successors in interest as if the principal had performed the act.

"Principal" means an individual who grants authority to an agent in a power of attorney.

"Sign" means having present intent to authenticate or adopt a record to: execute or adopt a tangible symbol; or attach to, or logically associate with the record an electronic sound, symbol, or process.

[15] See s. 744.102(12)(a), F.S., which provides a comparable definition for an "incapacitated person" as it relates to the management of property.
[16] See s. 736.0104, F.S.

"Third person" means any person other than the principal or the agent in the agent's capacity as agent.

**Section 5** creates s. 709.2103, F.S., which provides that this part (part II of ch. 709, F.S.) applies to all powers of attorney except:

- A proxy or other delegation to exercise voting rights or management rights with respect to an entity;
- A power created on a form prescribed by a government or its subdivision for a governmental purpose;
- A power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction; and
- A power created by a person other than an individual.

**Section 6** creates s. 709.2104, F.S., which provides that except as otherwise provided under this part (part II of ch. 709, F.S.), a power of attorney is durable if it contains the words: "This durable power of attorney is not terminated by subsequent incapacity of the principal except as provided in chapter 709, Florida Statutes," or similar words that show the principal's intent that the authority conferred is exercisable notwithstanding the principal's subsequent incapacity.

**Section 7** creates s. 709.2105, F.S., which specifies qualifications of the agent and requirements for the execution of a power of attorney. The agent must be a natural person who is 18 years of age or older or a financial institution that has trust powers, has a place of business in Florida, and is authorized to conduct trust business in Florida.

A power of attorney must be signed by the principal and by two subscribing witnesses and be acknowledged by the principal before a notary public or otherwise provided for the conveyance of real estate.[17]

**Section 8** creates s. 709.2106, F.S., which specifies that a power of attorney executed on or after October 1, 2011, is valid if its execution complies with s. 709.2105, F.S. A power of attorney executed before October 1, 2011 is valid if its execution complied with Florida law at the time of execution. Additionally, if the power of attorney is a durable power of attorney or a springing power of attorney, it will remain durable or springing under this act (part II of ch. 709, F.S.).

A power of attorney executed in another state which does not comply with the execution requirements of this part (part II of ch. 709, F.S.) is valid in Florida if the execution of the power of attorney complied with the law of the state of execution.[18] A third person who is requested to accept a power of attorney that is valid in Florida solely because of the requirement of s. 709.2106(3), F.S.,[19] may in good faith request, and rely upon, without further investigation, an

[17] See s. 695.03, F.S.
[18] This concept of portability makes powers of attorneys portable between states. See Real Property, Probate and Trust Law Section of the Florida Bar, White Paper: Chapter 709, F.S. (2011) (on file with the Senate Committee on Judiciary).
[19] The execution of the power of attorney complied with the law of the state of execution.

opinion of counsel as to any matter of law concerning the power of attorney, including the due execution and validity of the power of attorney. An opinion of counsel requested under s. 709.2106(3), F.S., must be provided at the principal's expense. A third person may accept a power of attorney that is valid in Florida solely because of s. 709.2106(3), F.S., if the agent does not provide the requested opinion of counsel, and in such case, a third person has no liability for refusing to accept the power of attorney. Subsection 709.2106(3), F.S., does not affect any other right of a third person who is requested to accept the power of attorney under this part (part II of ch. 709, F.S.), or any other provisions of applicable law.

Section 709.2106(4), F.S., provides that a military power of attorney is valid if it is executed in accordance with federal law, as amended. A deployment-contingent power of attorney may be signed in advance, and is effective upon deployment of the principal, and shall be afforded full force and effect by Florida courts.

**Section 9** creates s. 709.2107, F.S., which provides that the meaning and effectiveness of a power of attorney is governed by part II of ch. 709, F.S., if it is used in Florida or the power of attorney states that it is to be governed by the laws of Florida.

**Section 10** creates s. 709.2108, F.S., which specifies that except as provided in s. 709.2108(2), F.S., a power of attorney is exercisable when executed. Section 709.2108(2), F.S., provides that if a power of attorney executed before October 1, 2011, is conditioned on the principal's lack of capacity to manage property and the power of attorney has not become exercisable before that date, the power of attorney is exercisable upon delivery of an affidavit of a Florida-licensed medical or osteopathic physician. The affidavit must state that the physician is licensed to practice medicine or osteopathic medicine in Florida and that the physician believes that the principal lacks the capacity to manage property.

Except as provided in s. 709.2108(2), F.S., or s. 709.2106(4) F.S., a power of attorney is ineffective if the power of attorney provides that it is to become effective at a future date or upon the occurrence of a future event or contingency.

**Section 11** creates s. 709.2109, F.S., which provides requirements for the termination or suspension of a power of attorney or an agent's authority. A power of attorney terminates when:

- The principal dies;
- The principal becomes incapacitated, if the power is not durable;
- The principal is adjudicated totally or partially incapacitated by a court, unless the court determines that certain authority granted by the power of attorney is to be exercisable by the agent;
- The principal revokes the power of attorney;
- The power of attorney provides that it terminates;
- The purpose of the power of attorney is accomplished; or
- The agent's authority terminates and the power of attorney does not provide for another agent to act under the power of attorney.

An agent's authority is exercisable until the authority terminates. An agent's authority terminates when:

- The agent dies, becomes incapacitated, resigns, or is removed by a court;
- An action is filed for the dissolution or annulment of the agent's marriage to the principal or for their legal separation, unless the power of attorney otherwise provides; or
- The power of attorney terminates.

The authority granted under a power of attorney is suspended until the petition to initiate judicial proceedings to determine the principal's incapacity, or for the appointment of a guardian advocate, is dismissed or withdrawn or the court enters an order authorizing the agent to exercise one or more powers granted under the power of attorney. The agent may petition the court in which a proceeding is pending, in the event of an emergency, for authorization to exercise a power granted under the power of attorney. The petition must set forth the nature of the emergency, the property or matter involved, and the power to be exercised by the agent.

Notwithstanding s. 709.2109, F.S., unless otherwise ordered by the court, a proceeding to determine incapacity does not affect the authority of the agent to make health care decisions for the principal, including those provided in ch. 765, F.S., which deal with health care advance directives. If a health care advance directive has been executed by the principal, the terms of the directive control if the directive and the power of attorney are in conflict, unless the power of attorney is later executed and expressly states otherwise.

Termination or suspension of an agent's authority or of a power of attorney is ineffective as to the agent who, without knowledge of the termination or suspension, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

**Section 12** creates s. 709.2110, F.S., which specifies requirements for the revocation of a power of attorney. A principal may revoke a power of attorney by expressing the revocation in a subsequently executed power of attorney or other writing signed by the principal. The principal may give notice of the revocation to an agent who has accepted authority under the revoked power of attorney. The execution of a power of attorney does not revoke a power of attorney previously executed by the principal except as provided in this section.

**Section 13** creates s. 709.2111, F.S., which specifies requirements for co-agents and successor agents under a power of attorney. Unless the power of attorney states otherwise, each co-agent may exercise its authority independently. A principal may designate one or more successor agents to act if an agent dies, becomes incapacitated, is not qualified to serve, or declines to serve.

Except as otherwise provided in the power of attorney or s. 709.2111(4), F.S., an agent who does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions or omissions of the other agent.

Under s. 709.2111(4), F.S., an agent who has actual knowledge of a breach or imminent breach of fiduciary duty by another agent must take reasonable actions appropriate in the circumstances

to safeguard the principal's best interests. If the principal is not incapacitated, giving notice to the principal is sufficient. An agent who fails to take action is liable to the principal for reasonably foreseeable damages that the principal could have avoided if the agent had taken such action. A successor agent does not have a duty to review the conduct or decisions of a predecessor agent. Except as provided in s. 709.2111(4), F.S., a successor agent does not have a duty to institute any proceeding against a predecessor agent or file a claim against a predecessor agent's estate, for acts or omissions of the predecessor agent as an agent of the principal. If a power of attorney requires two or more persons as co-agents to act together, one or more of the agents may delegate to a co-agent the authority to conduct banking transactions as provided in s. 709.2208(1), F.S., whether the authority to conduct banking transactions is specifically enumerated or incorporated by reference to that section in the power of attorney.

**Section 14** creates s. 709.2112, F.S., which specifies requirements for the reimbursement and compensation of agents. Unless otherwise stated in the power of attorney, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal. Unless otherwise stated in the power of attorney, a qualified agent is entitled to compensation that is reasonable under the circumstances. Notwithstanding any provision in the power of attorney, an agent may not be paid compensation unless the agent is a qualified agent. A "qualified agent" is an agent who is the spouse of the principal, an heir of the principal, a financial institution that has trust powers and a place of business in Florida, an attorney or certified public accountant licensed in Florida, or a natural person who has never been an agent for more than three principals at the same time.

**Section 15** creates s. 709.2113, F.S., which provides that, except as provided in the power of attorney, a person accepts appointment as an agent by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance. The scope of an agent's acceptance is limited to those aspects of the power of attorney for which the agent's assertions or conduct reasonably manifests acceptance.

**Section 16** creates s. 709.2114, F.S., which specifies the duties of an agent. An agent is a fiduciary, must act only within the scope of authority granted in the power of attorney and may not act contrary to the principal's reasonable expectations actually known by the agent. The agent must act in good faith and not in a manner contrary to the principal's best interests with specified exceptions. The agent must attempt to preserve the principal's estate plan, to the extent actually known to the agent, if preserving the plan is consistent with the principal's best interests based on specified factors.[20] The agent is prohibited from delegating authority except as provided in law for the delegation of investment functions. The agent must keep records on behalf of the principal, as well as create and maintain an accurate inventory of the principal's safe-deposit box, if applicable.

[20] The mandatory duty "to preserve the principal's estate plan" is new to Florida law. Under the Uniform Powers of Attorney Act, it was a default duty rather than a mandatory one. The duty applies only to the extent the principal's estate plan is actually known by the agent and only when the preservation of the principal's estate plan is in the principal's best interest based on all relevant factors. The agent may not actually know the principal's estate plan but has a fiduciary duty to apply the relevant factors listed in the bill as to whether preservation of the estate is consistent with the principal's best interest. See discussion of the duty to preserve the principal's estate plan in White Paper, Real Property, Probate and Trust Law Section of the Florida Bar, *supra* note 4.

Except as otherwise provided in the power of attorney, the agent who has accepted appointment must act loyally for the sole benefit of the principal; act so as to not create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interests; and cooperate with a person who has authority to make health care decisions for the principal to carry out the principal's reasonable expectations and otherwise act in the principal's best interests. An agent who acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan. If an agent has special skills or expertise or was selected based on the agent's representation that the agent has such skills or expertise, then those special skills must be considered in determining whether the agent acted with care, competence, and diligence under the circumstances. Absent a breach of duty to the principal, an agent is not liable for a decline in the value of the principal's property. An agent must disclose specified information and documents within 60 days of the request or ask for additional time to comply with the request.

**Section 17** creates s. 709.2115, F.S., which provides requirements for the exoneration of an agent. A power of attorney may provide for exoneration of the agent for acts or decisions made in good faith and under the power of attorney except to the extent the provision:

- Relieves the agent of liability for breach of a duty committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the principal's best interest; or
- Was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

**Section 18** creates s. 709.2116, F.S., which provides that a court may construe or enforce a power of attorney, review the agent's conduct, terminate the agent's authority, remove the agent, and grant other appropriate relief. The following parties may petition the court: the principal or agent; a guardian, conservator, trustee, or other fiduciary acting for the principal or principal's estate; a person authorized to make health care decisions for the principal if the principal's health care is affected by the agent's actions; any other interested person; a governmental agency that has regulatory authority to protect the welfare of the principal; or a person asked to honor the power of attorney.

The court may award reasonable attorney's fees and costs in any proceeding commenced by the filing of a petition under this section. If an agent's exercise of power is challenged on the grounds that the exercise of power was affected by a conflict of interest and evidence is presented that the agent (or affiliate) had a personal interest in exercise of the power, then the agent or affiliate has the burden of proving, by clear and convincing evidence, that the agent acted solely in the interest of the principal or in good faith in the principal's best interest, and the conflict of interest was expressly authorized in the power of attorney. A provision authorizing an agent to engage in a transaction affected by a conflict of interest which is inserted into a power of attorney as the result of the abuse of a fiduciary or confidential relationship with the principal by the agent or the agent's affiliate is invalid.

The section recognizes and defines affiliates of the agent who may be involved in potential conflicts of interest in the exercise of the agent's powers. Affiliates of an agent include: the agent's spouse; the agent's descendant, siblings, parents, or their spouses; a corporation or entity

that owns a significant interest in the agent; or the agent acting in a fiduciary capacity for someone other than the principal.

**Section 19** creates s. 709.2117, F.S., which outlines an agent's liability to the principal or the principal's successors in interest for violations of applicable law . The agent may be required to restore the value of the principal's property to what it would be if the violation had not occurred and to reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid from the principal's funds on the agent's behalf in defense of the agent's actions.

**Section 20** creates s. 709.2118, F.S., which provides requirements and methods for an agent's resignation.

**Section 21** creates s. 709.2119, F.S., which provides that a third person, who in good faith accepts a power of attorney that appears to be executed in accordance with Florida law, may rely upon the power of attorney and enforce an authorized transaction against the principal's property as if the power of attorney, the agent's authority, and authority of the officer executing for or on behalf of a financial institution that has trust powers and acting as an agent were genuine, valid, and still in effect. A third person does not accept a power of attorney in good faith if the person has notice that the power of attorney or the purported agent's authority is void, invalid, or terminated.

A third person may require an agent to execute an affidavit stating where the principal is domiciled; that the principal is not deceased; that there has been no revocation, or partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the power of attorney; that the power of attorney has not been suspended by the initiation of proceedings to determine incapacity or the appointment of a guardian for the principal; and the reasons for the unavailability of the predecessor agents if the affiant is a successor agent. A third person may require an officer of a financial institution acting as agent to provide an affidavit that meets the requirements of this section. The form of affidavit executed by an agent is provided. Additionally, third persons who act in reliance upon the authority granted to the agent and in accordance with the instructions of the agent are held harmless by the principal from any loss suffered or liability incurred as a result of actions taken before the receipt of written notice of revocation, written notice of partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the power of attorney, notice of death of the principal, notice of suspension by initiation of proceedings to determine incapacity or to appoint a guardian, or other notice as provided in s. 709.2121, F.S.

**Section 22** creates s. 709.2120, F.S., which requires a third person to accept or reject a power of attorney within a reasonable time and to state in writing the reason for the rejection. A financial institution has four days, excluding Saturdays, Sundays, and legal holidays, to accept or reject a power of attorney for banking or security transactions. A third person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented. A third person is not required to accept a power of attorney if:

- The third person is not otherwise required to engage in a transaction with the principal in the same circumstances;

- The third person has knowledge of the termination or suspension of the agent's authority or of the power of attorney before exercising the power;
- A timely request by the third person for an affidavit, English transaction, or opinion of counsel is refused by the agent;
- The third person believes in good faith that the power is not valid or that the agent lacks authority to perform the act requested with exceptions; or
- The third person makes, or has knowledge that another person has made, a report to the local adult protective services office alleging that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or others acting for or with the agent;

A third person who refuses to accept a power of attorney, in violation of s. 709.2120, F.S., is subject to:

- A court order mandating acceptance of the power of attorney; and
- Liability for damages, including reasonable attorney's fees and costs incurred in an action that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

**Section 23** creates **s.** 709.2121, F.S., which provides requirements for notice. Notice, including a notice of revocation, notice of partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the power of attorney, notice of death of the principal, notice of suspension by initiation of proceedings to determine incapacity or to appoint a guardian, or other notice, is not effective until it is provided, in writing, to the agent or any third persons relying upon a power of attorney. Notice must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document on the agent or affected third person. Notice to a financial institution must contain the name, address, and the last four digits of the principal's taxpayer identification number and be directed to an officer or manager of the financial institution in Florida. Notice is effective when given, except notice to a financial institution, brokerage company, or title company, which is not effective until 5 days, excluding Saturdays, Sundays, and legal holidays, after it is received.

**Section 24** creates s. 709.2201, F.S., which outlines an agent's authority to exercise only specific authority granted to the agent except as provided in other applicable law. General provisions in a power of attorney which do not identify the specific authority granted, such as the authority to do all acts, are not an express grant of specific authority. Therefore, such general provisions do not grant any authority to the agent. Court approval is not required for any action of the agent in furtherance of an express grant of a specific authority. Authorization to an agent in a power of attorney may include authority to:

- Execute stock powers or similar documents on behalf of the principal and delegate to a transfer agent or similar person the authority to register any stocks, bonds, or other securities into or out of the principal's or nominee's name.
- Convey or mortgage homestead property with some requirements for joinder of the principal's spouse or the spouse's guardian if the principal is married.

If such authority is specifically granted in a durable power of attorney, the agent may make all health care decisions on behalf of the principal, including health care advance directives specified in ch. 765, F.S. An agent may not: perform duties under a contract that requires the exercise of personal services of the principal; make any affidavit as to the personal knowledge of the principal; vote in any public election on behalf of the principal; execute or revoke any will or codicil for the principal; or exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary.

If the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls. Authority granted in a power of attorney is exercisable with respect to property the principal has when the power of attorney is executed and to property the principal later acquires, whether or not the property is located in Florida and whether or not the authority is exercised or the power of attorney is executed in Florida. Acts by the agent under the power of attorney have the same effect and inure to the benefit of and bind the principal and his or her successors in interest as if the principal had performed the act.

**Section 25** creates s. 709.2202, F.S., notwithstanding s. 709.2201, F.S., which provides that only if the principal signed or initialed next to each specific enumeration of the authority, the exercise of the authority is consistent with the agent's duties under s. 709.2114, F.S., and the exercise is not otherwise prohibited by another agreement or instrument, an agent may exercise the following authority:

- Create an inter vivos trust;
- Amend, modify, revoke, or terminate a trust created by or on behalf of the principal and only if the trust instrument explicitly authorizes such acts by the settlor's agent;
- Make a gift with specified limitations;
- Create or change a beneficiary designation;
- Waive the principal's right to be a beneficiary of a joint and survivor annuity, including survivor benefits under a retirement plan; or
- Disclaim property and powers of appointment.

Notwithstanding a grant of authority to do an act authorized under this section, unless the power of attorney otherwise provides, an agent who is not an ancestor, spouse or descendant of the principal may not exercise authority to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

Unless the power of attorney otherwise provides, a provision in a power of attorney granting general authority with respect to gift authorizes the agent to only:

- Make outright to, or for the benefit of, a person a gift of any of the principal's property in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion without regard to whether the federal gift tax exclusion applies to the gift, or if the principal's spouse agrees to consent to a split gift in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and

- Consent to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.

Section 709.2202(4), F.S., specifies additional acts that do not require specific authority,[21] if the agent is authorized to conduct banking transactions. A bank or other financial institution does not have a duty to inquire as to the appropriateness of the agent's exercise of that authority and is not liable to the principal or any other person for actions taken in good faith reliance on the appropriateness of the agent's actions. The agent's fiduciary duties to the principal with respect to the exercise of the power of attorney under the acts specified in s. 709.2202(4), F.S., are not eliminated.

Section 709.2202, F.S., does not apply to a power of attorney executed before October 1, 2011.

**Section 26** creates s. 709.2208(1), F.S., which provides that a power of attorney that includes a statement that the agent has "authority to conduct banking transactions as provided in s. 709.2208(1), F.S.," grants general authority to the agent to engage in specified transactions with financial institutions without additional specific enumeration in the power of attorney which include but are not limited to authority to:

- Establish, continue, modify, or terminate an account or other banking arrangement with a financial institution;
- Contract for services available from a financial institution;
- Withdraw, by check, order, electronic funds transfer, or otherwise, money or property of the principal deposited with or left in the custody of a financial institution;
- Receive statements of accounts, vouchers, notices, and similar documents from a financial institution and act with respect to them;
- Purchase cashier's checks, official checks, counter checks, bank drafts, money orders, and similar instruments;
- Endorse and negotiate checks, cashier's checks, official checks, drafts, and other negotiable paper of the principal or payable to the principal or the principal's order, transfer money, and accept a draft drawn by a person upon the principal and pay it when due;
- Apply for, receive, and use debit cards, electronic transaction authorizations, and traveler's checks from a financial institution;
- Use, charge, or draw upon any line of credit, credit card, or other credit established by the principal with a financial institution; and
- Consent to an extension of time of payment with respect to commercial paper or a financial transaction with a financial institution.

Section 709.2208(2), F.S., provides that a power of attorney that includes a statement that the agent has "authority to conduct investment transactions as provided in s. 709.2208(2), F.S.," grants general authority to the agent with respect to securities held by financial institutions to take specified actions without additional specific enumeration in the power of attorney which include, but are not limited to, authority to:

[21] These acts do not require specific authority: making a deposit to or withdrawal from an insurance policy, retirement account, individual retirement account, benefit plan, bank account, or any other account held jointly or otherwise held in survivorship or payable on death.

- Buy, sell, and exchange investment instruments;
- Establish, continue, modify, or terminate an account with respect to investment instruments;
- Pledge investment instruments as security to borrow, pay, renew, or extend the time of payment of a debt of the principal;
- Receive certificates and other evidences of ownership with respect to investment instruments;
- Exercise voting rights with respect to investment instruments in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote; and
- Sell commodity futures contracts and call and put options on stocks and stock indexes.

"Investment instruments" is defined for purposes of s. 709.2208(2), F.S., and expressly excludes commodity futures contracts and call and put options on stocks and stock indexes.

**Section 27** creates s. 709.2301, F.S., which provides that the common law of agency and principles of equity supplement this part (part II of ch. 709, F.S.), except as modified by this part (part II of ch. 709, F.S.) or other state law.

**Section 28** creates s. 709.2302, F.S., which provides that this part (part II of ch. 709, F.S.) does not supersede any other law applicable to financial institutions or other entities, and that law controls if inconsistent with this part (part II of ch. 709, F.S.).

**Section 29** creates s. 709.2303, F.S., which provides that the remedies under this part (part II of ch. 709, F.S.) are not exclusive and do not abrogate any right or remedy under any other law than this part (part II of ch. 709, F.S.).

**Section 30** creates s. 709.2401, F.S., which provides that this part (part II of ch. 709, F.S.) modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, but does not modify, limit, or supersede s. 101(c) of that federal act or authorize electronic delivery of any of the notices described in s. 103(b) of that federal act.

**Section 31.** Section 709.2402 provides that, except as otherwise provided in part II (part II of ch. 709, F.S.), part II:

- Applies to a power of attorney created before, on, or after October 1, 2011, and to acts of the agent occurring on or after that date.
- An act of the agent occurring before October 1, 2011, is not affected by this part (part II, of ch. 709, F.S.).

**Section 32** amends 736.0602, F.S., in order to correct a statutory cross-reference to s. 709.2202, F.S.

**Section 33** repeals s. 709.01, F.S., relating to the authority of a power of attorney when the principal is dead; s. 709.015, F.S., relating to the authority of an agent under a power of attorney when the principal is listed as missing; s. 709.08, F.S., relating to a durable power of attorney; and s. 709.11, F.S., relating to a deployment-contingent power of attorney.

**Section 34** provides an effective date of October 1, 2011.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Judiciary on March 14, 2011:**
The committee substitute corrects references to Florida licensed medical and osteopathic physicians and their duties to execute an affidavit of a principal's incapacity for a springing power of attorney to take effect at the time of the principal's incapacity. The committee substitute revises the bill to clarify that the agent of a power of attorney must attempt to preserve the principal's estate plan, as the plan is known to the agent, and as the agent applies the factors to determine whether the preservation is consistent with the

principal's best interest. The committee substitute corrects several scrivener's errors and statutory cross-references to conform to changes in the bill.

B. Amendments:

None.

**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.)

Prepared By: The Professional Staff of the Rules Committee

| | |
|---|---|
| BILL: | SB 652 |
| INTRODUCER: | Senators Simmons and Altman |
| SUBJECT: | Liability of Spaceflight Entities |
| DATE: | April 1, 2011 REVISED: |

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Fleming | Carter | MS | **Favorable** |
| 2. | Boland | Maclure | JU | **Favorable** |
| 3. | Boland | Phelps | RC | **Pre-meeting** |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

This bill saves from future repeal the statute that provides spaceflight entities with immunity from liability for the loss, damage, or death of a participant resulting from the inherent risks of spaceflight activities. The bill eliminates the statute's scheduled repeal date of October 2, 2018.

This bill substantially amends section 331.501, Florida Statutes.

## II. Present Situation:

In 2008, the Legislature enacted s. 331.501, F.S., which provides that a spaceflight entity[1] is not liable for injury to or death of a spaceflight participant[2] resulting from the inherent risks of spaceflight launch activities,[3] so long as a required warning is given to and signed by the participant. The law further provides that a participant or participant's representative may not recover from a spaceflight entity for the loss, damage, or death of the participant resulting exclusively from any of the inherent risks of spaceflight activities. The immunity provided by

[1] "Spaceflight entity" means any public or private entity holding a United States Federal Aviation Administration launch, reentry, operator, or launch site license for spaceflight activities.

[2] "Spaceflight participant" means an individual, who is not crew, carried within a launch vehicle or reentry vehicle as defined in 49 U.S.C. s. 70102.

[3] "Spaceflight activities" means launch services or reentry services as those terms are defined in 49 U.S.C. s. 70102. That federal statute defines "launch services" as activities involved in the preparation of a launch vehicle, payload, crew (including crew training), or space flight participant for launch and the conduct of a launch, and it defines "reentry services" as activities involved in the preparation of a reentry vehicle and payload, crew (including crew training), or space flight participant for reentry and the conduct of a reentry.

s. 331.501, F.S., does not apply if the injury was proximately caused by the spaceflight entity and the spaceflight entity:

- Commits gross negligence or willful or wanton disregard for the safety of the participant;
- Has actual knowledge or reasonably should have known of a dangerous condition; or
- Intentionally injures the participant.

To receive the immunity, the spaceflight entity must have each participant sign a required warning statement. The warning statement must contain, at a minimum, the following statement:

> WARNING: Under Florida law, there is no liability for an injury to or death of a participant in a spaceflight activity provided by a spaceflight entity if such injury or death results from the inherent risks of the spaceflight activity. Injuries caused by the inherent risks of spaceflight activities may include, among others, injury to land, equipment, persons, and animals, as well as the potential for you to act in a negligent manner that may contribute to your injury or death. You are assuming the risk of participating in this spaceflight activity.

The limitation on liability established in s. 331.501, F.S., is in addition to any other limitation of legal liability that might otherwise be provided by law.

Section 331.501, F.S., includes a provision that the section will expire on October 2, 2018, unless reviewed and reenacted by the Legislature.

## III. Effect of Proposed Changes:

This bill saves from future repeal the section of the Florida Statutes which provides spaceflight entities with immunity from liability for the loss, damage, or death of a participant resulting from the inherent risks of spaceflight activities. Specifically, the bill deletes the provision from s. 331.501, F.S., which provides for the statute to expire on October 2, 2018, unless reviewed and reenacted by the Legislature.

The bill provides an effective date of July 1, 2011.

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

## V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent that the removal of the sunset provision from s. 331.501, F.S., encourages private sector economic activity by providing additional incentives for private space flight companies to locate in Florida, the bill could have a positive private sector impact.

C. Government Sector Impact:

None.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.