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Committee on Governmental Oversight and Accountability

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 627.3121, F.S., FLORIDA WORKERS' COMPENSATION JOINT UNDERWRITING ASSOCIATION, INC.

Issue Description

The Florida Workers' Compensation Joint Underwriting Association, Inc. (JUA), created by the Legislature in 1993, is a nonprofit, self-funding entity that is the insurer of last resort for employers who are unable to secure workers' compensation insurance coverage in the voluntary market.

Section 627.3121, F.S., provides that certain records and meetings held by the JUA are confidential and exempt from the public-records requirements found in s. 119.07(1), F.S., and Article I, Section 24(a) of the Florida Constitution, and from the public-meetings requirements found in s. 286.011, F.S., and Article I, Section 24(b) of the Florida Constitution. The public-records and –meetings exemption specifies circumstances under which the protected information may be disclosed.

This public-records and –meetings exemption is subject to the Open Government Sunset Review Act, s. 119.15, F.S., and will expire October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature. This report reviews the public-records and –meetings exemption for specified records and meetings held by the JUA in accordance with the Open Government Sunset Review Act.

Background

Florida Public-Records and -Meetings 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.² Article I, s. 24 of the State Constitution, provides that:

(a) 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.

¹ Section 1390, 1391 Florida Statutes. (Rev. 1892).

² Article I, s. 24 of the State Constitution.

In addition to the State Constitution, the Public Records Act,³ which pre-dates the current State Constitution, 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 agency⁴ 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.⁵

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.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

Article I, s. 24 of the State Constitution also 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. In addition, the Sunshine Law, s. 286.011, F.S., provides 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.

Only the Legislature is authorized to create exemptions to open government requirements.⁸ An exemption must be created in general law, must state the public necessity justifying it, and must not be broader than necessary to meet that public necessity.⁹ A bill enacting an exemption¹⁰ 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

³ Chapter 119, F.S.

⁴ 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.”

⁵ s. 119.011(12), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁸ Art. I, s. 24(c) of the State Constitution.

⁹ *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).

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

¹² Attorney General Opinion 85-62.

made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹³

The Open Government Sunset Review Act (the Act)¹⁴ provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act or the Sunshine Law. 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.

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 is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. The three statutory criteria are that 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; 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.¹⁵

The Act also requires the Legislature to consider 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?

While the standards in the Act may appear to limit the Legislature in the exemption review process, those aspects of the Act that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.¹⁶ The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(8), F.S., makes explicit that:

... notwithstanding s. 778.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Florida Workers' Compensation Joint Underwriting Association, Inc.

The Florida Workers' Compensation Joint Underwriting Association, Inc. (JUA), created by the Legislature in 1993, is a nonprofit, self-funding entity that is the insurer of last resort for employers who are unable to secure workers' compensation insurance coverage in the voluntary market.¹⁷

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁴ s. 119.15, F.S.

¹⁵ s. 119.15(6)(b), F.S.

¹⁶ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

¹⁷ Florida Workers' Compensation Joint Underwriting Association, Inc., *Welcome*, <http://www.fwcjua.com/> (last viewed

Public-Records and -Meetings Exemption Under Review

Section 627.3121, F.S., provides that the following records and portions of meetings held by the JUA are confidential and exempt from constitutional and statutory public-records and –meetings requirements:

- Underwriting files, except that a policyholder or an applicant is authorized access to his or her own underwriting files;
- Claims files until the termination of all litigation and settlement of all claims arising out of the same accident, except that portions of the claims files may remain confidential or exempt if otherwise provided by law;
- Records obtained or generated by an internal auditor until the audit is completed, or if the audit is part of an investigation, until the investigation is closed or ceases to be active;
- Proprietary information licensed to the JUA under contract when the contract requires the association to maintain the confidentiality;
- Medical records, which include information relating to the medical condition or medical status of an individual;
- All records relative to the participation of an employee in an employee assistance program, except as otherwise provided in s. 440.102(8), F.S.;
- Information relating to negotiations for financing, reinsurance, depopulation, or contractual services, until the conclusion of the negotiations;
- Reports regarding suspected fraud or other criminal activity and producer appeals and related reporting regarding suspected misconduct until the investigation is closed or ceases to be active;
- Information secured from the Department of Revenue regarding payroll information and client lists of employee leasing companies authorized under ss. 440.381 and 468.529, F.S.;
- A public record prepared by an attorney retained by the JUA to protect or represent the interests of the JUA or prepared at the attorney's express direction, that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association;
- That portion of a meeting of the JUA's board of governors or any subcommittee thereof at which the confidential and exempt records are discussed; all exempt portions must be recorded and transcribed and preserved for a minimum of 5 years; and
- The transcript and minutes of exempt portions of meetings; those portions of the transcript or the minutes pertaining to a confidential and exempt claims file are no longer confidential and exempt upon termination of all litigation with regard to that claim.

The public-records and public-meetings exemption authorizes the release of underwriting files and claims files to a carrier who is considering underwriting a risk insured by the JUA, a producer seeking to place such risk with such a carrier, or another entity seeking to arrange voluntary market coverage for association risks. Before such release, the carrier, producer, or other entity must agree in writing to maintain the confidentiality of the files until that entity agrees to underwrite the risk or provide voluntary market coverage. The exemption also allows the protected records to be released, upon written request, to another agency in the performance of that agency's official duties and responsibilities.

The public necessity statement for the public-records exemption provides, in part, that:

... the exemption from public records requirements for open claims files of the association is necessary for the effective and efficient administration of an entity created to provide workers' compensation and employer's liability insurance as described in s. 627.311(5), Florida Statutes. Claims files contain detailed information concerning the claim, medical information, and other sensitive personal information concerning the claimant, and also contain information detailing the evaluation of the legitimacy of the claim, the extent of incapacity, and a valuation of the award. Information in a claims file that is held by the association includes the medical records and other information related to the medical condition or medical status of a claimant. The Legislature finds that the claimants' medical records and other medical-related information are personal and sensitive. Matters of personal health are traditionally a private and confidential concern. The release of the medical records would violate the privacy of an individual or could cause unwarranted damage to the name or reputation of that individual. The

Legislature finds that information relating to the medical, mental, or behavioral condition of an employee of the association is private and that matters of personal health are traditionally a private and confidential concern. The Legislature finds that the association must conduct ongoing negotiations for financing, reinsurance, contractual services, or related matters to perform the duties assigned to the association. If such information were made public prior to the conclusion of the negotiations, the association's bargaining position would be severely damaged, resulting in additional cost to the association and the public. The Legislature also finds that, because the association will investigate insurance fraud, criminal investigations of insurance fraud would be harmed if reports of suspected fraudulent activity were made public. The Legislature has also recognized a need for the Department of Revenue to provide payroll information and client lists of employee leasing companies to the association in the furtherance of its duties and responsibilities. Such information is proprietary business information and traditionally is private. The Legislature finds that the internal audit process, and therefore accountability to the public, will be damaged if records relating to an incomplete internal audit or investigation are made public. The Legislature finds that although the association is an agency within the meaning of the public records and open meetings laws, the association essentially operates as a private business. Its core function is to engage in the business of providing workers' compensation insurance coverage, as distinguished from an agency whose core functions are governmental in nature. The association does not exercise the authority or perform the functions of a department or political subdivision, and lacks the power to enforce laws. The Legislature further finds that the general exemptions in chapters 119 and 286 relating to records created by attorneys and communications with attorneys are designed to address the needs of agencies providing governmental functions and are generally limited to matters relating to litigation and adversarial administrative matters ... According, the Legislature finds that the association would not be able to carry out its core business functions effectively without the free and confidential exchange of attorneys' mental impressions, conclusions, litigation strategies, and legal theories, both as to business matters and as to litigation and administrative matters.¹⁸

The public necessity for the public-meetings exemption provides, in part:

... Closing access to meetings of the board of directors of the association, or a subcommittee of the board, wherein confidential and exempt records are discussed is essential to preserving the confidentiality of those records. Further, it enables the association to carry out its statutory duty of providing workers' compensation coverage. Furthermore, the Legislature finds that minutes and transcripts of exempt portions of meetings should be made confidential and exempt from public records requirements. Release of those records would defeat the purpose of holding a closed meeting.¹⁹

This public-records and –meetings exemption will expire October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature.²⁰

Findings and/or Conclusions

The public-records and –meetings exemption that is at issue under this Open Government Sunset Review makes confidential and exempt from public disclosure specified information held by the JUA and specified portions of meetings of the JUA's board of governors or any subcommittee of the board.

The Open Government Sunset Review Act requires consideration of a number of questions in the performance of a review under the act:

- **What specific records or meetings are affected by the exemption?** The exemption protects specified records and portions of meetings held by the JUA.
- **Whom does the exemption uniquely affect, as opposed to the general public?** The exemption uniquely affects the JUA, companies doing business with the JUA, and workers insured by JUA policies.
- **What is the identifiable public purpose or goal of the exemption?** The identifiable public purpose or goal of the exemption as stated in the statement of public necessity is to protect the personal identifying information

¹⁸ Chapter 2007-202, s. 2, L.O.F.

¹⁹ Chapter 2007-202, s. 3, L.O.F.

²⁰ Chapter 2007-202, s. 1, L.O.F.

of workers insured by JUA policies, to promote the effective and efficient administration of the JUA, and to protect information of a proprietary business information nature of companies doing business with the JUA.

- **Can the information contained in the records or discussed in the meeting be readily obtained by alternative means?** It is unlikely because the protected information is not otherwise provided to governmental entities.
- **Is the record or meeting protected by another exemption?** The public-records exemption in s. 119.071(1)(b), F.S., protects specified records related to competitive solicitations; however, JUA staff stated that subsection (1)(g) of the exemption under review protects negotiations which are not associated with competitive solicitations.²¹ Subsection (1)(j) of the exemption under review, which protects specified public records prepared by an attorney for the JUA, is more expansive in scope than the general public-records exemption for attorney-generated records found in s. 119.071(1)(d)1., F.S.²² Although the JUA has used subsection (4)(a) of the exemption under review to exempt that portion of a meeting at which a systems security audit was discussed, which would also be protected under s. 286.0113(1), F.S., JUA staff stated that there may be other instances which would not be protected by s. 286.0113(1), F.S., but which would be protected by subsection (4)(a) of the exemption under review.²³
- **Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?** No.

Options and/or Recommendations

Senate professional staff recommends that the Legislature reenact the public-records exemption established in s. 627.3121, F.S., which makes specified information held by the JUA, confidential and exempt from disclosure. This recommendation is made in light of the information gathered for this Open Government Sunset Review which indicates that there is a public necessity to continue to protect the specified information in order to promote the efficient and effective administration of a governmental program, to protect information of a sensitive personal nature concerning individuals, and to protect information of a confidential nature concerning entities, as required by the Open Government Sunset Review Act.

The Legislature may wish to consider amending s. 627.3121(1)(e), F.S., from its current language to “Medical information” to remove redundant language. The JUA receives information from medical records, not medical records specifically,²⁴ so such an amendment would narrow the scope of the exemption to something already protected by the statute.

²¹ Email correspondence with JUA (August 6, 2011), on file with the Senate Governmental Oversight and Accountability Committee. Reinsurance commutation agreements, for example, involve contracts by which the JUA and a reinsurance company agree to terminate an existing reinsurance agreement. Additionally, pursuant to s. 627.311(5)(c)13.a., F.S., contracts valued at less than \$25,000 are not subject to competitive solicitation.

²² The public-records exemption in s. 119.071(1)(d)1., F.S., protects only specified records that are prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or that is prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings.

²³ Email correspondence with JUA (August 6, 2011), on file with the Senate Governmental Oversight and Accountability Committee. As an example, JUA staff gave the possibility that the board of governors or one of its subcommittees could be called upon to discuss potential fraudulent activities by someone with whom the JUA does business. Section 286.0113(1), F.S., provides that “that portion of a meeting that would reveal a security system plan or portion thereof made confidential and exempt by s. 119.071(3)(a)” is exempt from public-meetings requirements.

²⁴ Telephone conference with JUA (July 18, 2011).