

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 Committee on Banking and Insurance

BILL: SPB 7024

INTRODUCER: For consideration by the Banking and Insurance Committee

SUBJECT: OGSR/Title Insurance Agencies or Insurers/Office of Insurance Regulation

DATE: March 13, 2017

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Billmeier	Knudson		Pre-meeting

I. Summary:

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption 5 years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

Title insurers and title insurance agencies are required to submit to the Office of Insurance Regulation (OIR), by May 31 of each year, data that have been identified as necessary to assist in the analysis of premium rates, title search costs, and the condition of Florida's title insurance industry. Current law provides that proprietary business information provided to OIR by a title insurance agency or insurer is confidential and exempt from public record requirements until such information is otherwise publicly available or is no longer treated by the title insurance agency or insurer as proprietary business information. However, information provided by multiple title insurance agencies and insurers may be aggregated on an industry-wide basis and disclosed to the public as long as the specific identities of the agencies or insurers are not revealed.

The bill reenacts the public record exemption, which will repeal on October 2, 2017, if this bill does not become law.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ This applies to the official business of any public body, officer or employee of the state, including all three branches of state government, local governmental entities and any person acting on behalf of the government.²

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(a).

In addition to the Florida Constitution, the Florida Statutes provides that the public may access legislative and executive branch records.³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁴ The Public Records Act states that

it is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁵

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁶ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

The Legislature may create an exemption to public records requirements.⁹ An exemption must pass by a two-thirds vote of the House and the Senate.¹⁰ In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.¹¹ A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.¹²

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹³ Records designated as ‘confidential and exempt’ may

³ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So.2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ Section 119.011(12), F.S., defines “public record” 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.” Section 119.011(2), F.S., defines “agency” to mean 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.”

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ FLA. CONST., art. I, s. 24(c).

¹² *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So.2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So.2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

¹³ If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).

be released by the records custodian only under the circumstances defined by the Legislature. Records designated as ‘exempt’ may be released at the discretion of the records custodian.¹⁴

Open Government Sunset Review Act

In addition to the constitutional requirements relating to the enactment of a public records exemption, the Legislature may subject the new or broadened exemption to the Open Government Sunset Review Act (OGSR).

The OGSR prescribes a legislative review process for newly created or substantially amended public records.¹⁵ The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹⁶ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

Under the OGSR the purpose and necessity of reenacting the exemption are reviewed. The Legislature must consider the following questions during its review of an exemption:¹⁷

- 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?

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.¹⁸ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are not required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless otherwise provided for by law.¹⁹

Title Insurance Regulation

Under current law, two entities provide regulatory oversight of the title insurance industry: the Department of Financial Services (DFS), which regulates title agents, and the OIR, which regulates title insurers, including licensing and promulgation of rates. Rates and premiums

¹⁴ A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991).

¹⁵ Section 119.15, F.S. According to s. 119.15(4)(b), F.S., a substantially amended exemption is one that is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S. The OGSR process is currently being followed, however, the Legislature is not required to continue to do so. The Florida Supreme Court has found that one legislature cannot bind a future legislature. *Scott v. Williams*, 107 So.3d 379 (Fla. 2013).

¹⁶ Section 119.15(3), F.S.

¹⁷ Section 119.15(6)(a), F.S.

¹⁸ FLA. CONST., art. I, s. 24(c).

¹⁹ Section 119.15(7), F.S.

charged by title insurers are specified by rule by the Financial Services Commission.²⁰ Title insurers may deviate from the proscribed rates by petitioning OIR for an order authorizing a specific deviation from the adopted premium.²¹

Title Insurers and Title Agencies Data Submission

Section 627.782(8), F.S., requires title insurers and title agencies to submit to OIR, on or before May 31 of each year, revenue, loss, and expense data for the most recently concluded year that are determined necessary to assist in the analysis of premium rates, title search costs, and the condition of the Florida title insurance industry.

Public Record Exemption under Review

In 2012, the Legislature created a public record exemption for proprietary business information provided to OIR by a title insurance agency or insurer. The information is confidential and exempt from public record requirements until such information is otherwise publicly available or is no longer treated by the title insurance agency or insurer as proprietary business information. However, information provided by multiple title insurance agencies and insurers may be aggregated on an industry-wide basis and disclosed to the public as long as the specific identities of the agencies or insurers are not revealed. The exemption defines “proprietary business information” as information that:

- Is owned or controlled by a title insurance agency or insurer requesting confidentiality;
- Is intended to be and is treated by the title insurance agency or insurer as private in that the disclosure of the information would cause harm to the business operations of the title insurance agency or insurer;
- Has not been publicly disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or a private agreement, providing that the information may be released to the public; and
- Concerns business plans, internal auditing controls and reports of internal auditors, reports of external auditors for privately held companies, trade secrets as defined in s. 688.002, F.S., or financial information, including, but not limited to, revenue data, loss expense data, gross receipts, taxes paid, capital investment, customer identification, and employee wages.²²

The 2012 public necessity statement for the exemption provides that:

The disclosure of information, such as revenue data, loss expense data, gross receipts, the amount of taxes paid, the amount of capital investment, customer identification, and the amount of employee wages paid, could injure a business in the marketplace by providing its competitors with detailed insights into the financial status and the strategic plans of the business, thereby diminishing the advantage that the business maintains over competitors that do not possess such information. Without this exemption, title insurance agencies and title insurers, whose records are generally not required to be open to the public, might refrain

²⁰ s. 627.782, F.S.

²¹ s. 627.783, F.S.

²² s. 626.84195, F.S.

from providing accurate and unbiased data, thus impairing the Office of Insurance Regulation's ability to set fair and adequate title insurance rates. Proprietary business information derives actual or potential independent economic value from not being generally known to, and not being readily ascertainable by proper means by, other persons who can derive economic value from its disclosure or use. The Office of Insurance Regulation, in performing its lawful duties and responsibilities, may need to obtain information from the proprietary business information. Without an exemption from public records requirements for proprietary business information provided to the Office of Insurance Regulation, such information becomes a public record when received and must be divulged upon request. Divulgence of any proprietary business information under the public records law would destroy the value of that property to the proprietor, causing a financial loss not only to the proprietor but also to the residents of this state due to the loss of reliable financial data necessary for fair and adequate rate regulation. Release of proprietary business information would give business competitors an unfair advantage and weaken the position in the marketplace of the proprietor that owns or controls the proprietary business information. The harm to businesses in the marketplace and to the effective administration of the ratemaking function caused by the public disclosure of such information far outweighs the public benefits derived from its release. In addition, the confidentiality provided by this act does not preclude the reporting of statistics in the aggregate concerning the collection of data, as well as the names of the title insurance agencies and title insurers participating in the data collection. Such aggregate reported data is available to the public and is important to an assessment of the setting of title insurance premiums.²³

The exemption will repeal on October 2, 2017, unless reviewed and saved from repeal by the Legislature.

During the 2016 interim, committee staff consulted with OIR staff as part of the Open Government Sunset Review process. OIR staff indicated that the exemption was necessary to encourage candid participation in OIR data collection efforts and recommended reenactment of the exemption. If the exemption were to lapse, OIR staff believes that title insurers and title agencies would be hesitant to submit information to OIR for fear that their competitors would gain access to sensitive business information. OIR staff indicated that it does not collect "customer identification" and therefore would not object to that term being removed as an example of "financial information" within the exemption.

III. Effect of Proposed Changes:

The bill reenacts the public record exemption for "proprietary business information" provided to the OIR by title insurance agency or insurer.

The bill takes effect October 1, 2017.

²³ Ch. 2012-207, L.O.F.

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. Statutes Affected:

This bill substantially amends section 626.84195 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
