

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7091 PCB OTM 19-16 OGSR/Hurricane and Flood Loss Model Trade Secrets
SPONSOR(S): Oversight, Transparency & Public Management Subcommittee; Fischer
TIED BILLS: **IDEN./SIM. BILLS:** SB 7054

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Oversight, Transparency & Public Management Subcommittee	12 Y, 0 N	Moore	Harrington
1) Commerce Committee	19 Y, 0 N	Fortenberry	Hamon
2) State Affairs Committee	21 Y, 0 N	Moore	Williamson

SUMMARY ANALYSIS

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

In 1995, the Legislature established the Florida Commission on Hurricane Loss Projection Methodology (commission) to serve as an independent body within the State Board of Administration. The commission is charged with setting standards for hurricane loss projection methodology and examining the methods employed in proprietary hurricane loss models used by private insurers in setting property insurance rates to determine whether they meet the commission's standards.

In 2014, the Legislature expanded the commission's oversight to include flood loss models submitted by insurers wanting to offer private flood insurance in competition with the National Flood Insurance Program. As part of the commission's expanded oversight, the Legislature also expanded public record and public meeting exemptions for trade secrets used in hurricane loss models to include trade secrets used in flood loss models. Under the public record exemption, a trade secret that is used in designing and constructing a hurricane or flood loss model that is provided by a private company to the commission, Office of Insurance Regulation, or the consumer advocate appointed by the Chief Financial Officer is confidential and exempt from public record requirements. The expanded public meeting exemption protects any portion of a commission meeting or of a rate proceeding on an insurer's rate filing at which such confidential and exempt trade secret is discussed. Any such meeting must be recorded, and the recording of the closed portion of the meeting is exempt from public record requirements.

The bill saves from repeal the public record and public meeting exemptions, which will repeal on October 2, 2019, if this bill does not become law.

The bill does not appear to have a fiscal impact on the state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Open Government Sunset Review Act

The Open Government Sunset Review Act¹ 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 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.²

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:

- Allow the state or its political subdivisions to administer effectively and efficiently a governmental program, which administration would be significantly impaired without the exemption.
- Protect 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.
- Protect trade or business secrets.³

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.⁴ 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 exemption is created⁵ then a public necessity statement and a two-thirds vote for passage are not required.

Florida Commission on Hurricane Loss Projection Methodology

In 1995, the Legislature established the Florida Commission on Hurricane Loss Projection Methodology (commission) to serve as an independent body within the State Board of Administration.⁶ The commission is charged with setting standards for hurricane loss projection methodology and examining the methods employed in proprietary hurricane loss models used by private insurers in setting property insurance rates to determine whether they meet the commission's standards. The commission adopts findings on the accuracy or reliability of the methods, standards, principles, models, and other means used to project hurricane losses. Only hurricane loss models or methods that the commission deems accurate or reliable can be used by insurers in rate filings to estimate hurricane losses that are used to set property insurance rates.

Public Record and Public Meeting Exemptions for Trade Secrets in Hurricane Loss Models

Current law provides a public record exemption for trade secrets⁷ that are used in designing and constructing hurricane loss models and that are provided by a private company to the commission, the

¹ Section 119.15, F.S.

² Section 119.15(3), F.S.

³ Section 119.15(6)(b), F.S.

⁴ Section 24(c), Art. I of the State Constitution.

⁵ An example of an exception to a public record exemption would be allowing another agency access to confidential and exempt records.

⁶ Section 627.0628, F.S.

⁷ The term "trade secret" is defined as information, including a formula, pattern, compilation, program, device, method, technique, or process that:

Office of Insurance Regulation (OIR), or the consumer advocate appointed by the Chief Financial Officer.⁸ Such information is confidential and exempt⁹ from public record requirements. In addition, current law provides a public meeting exemption for any portion of a commission meeting or of a rate proceeding on an insurer's rate filing at which a confidential and exempt trade secret is discussed.¹⁰ Any such meeting must be recorded, and the recording of the closed portion of the meeting is exempt from public record requirements.¹¹

Flood Loss Models

In 2014, the Legislature expanded the commission's oversight to include flood loss models submitted by insurers wanting to offer private flood insurance in competition with the National Flood Insurance Program.¹² To support a flood insurance rate for those filed with and approved by OIR before use, the legislation allowed flood losses to be projected by a flood loss model found acceptable or reliable by the commission. If a flood rate is not filed with or approved by OIR and OIR examines the rate after use, OIR will consider whether the insurer's flood rate was set based on flood losses projected by a commission-approved model. The commission is required to consider any actuarial methods, principles, standards, or models that have the potential for improving the accuracy of or reliability of the flood loss projections used in rate filings for personal lines residential flood insurance coverage.¹³

Public Record Exemption under Review

As part of the commission's expanded oversight, in 2014 the Legislature also expanded the public record and public meeting exemptions for trade secrets used in hurricane loss models to include trade secrets used in flood loss models.¹⁴ Under the public record exemption, a trade secret that is used in designing and constructing a hurricane or flood loss model and that is provided by a private company to the commission, OIR, or the consumer advocate is confidential and exempt from public record requirements.¹⁵ The expanded public meeting exemption protects any portion of a commission meeting or of a rate proceeding on an insurer's rate filing at which such confidential and exempt trade secret is discussed.¹⁶ Any such meeting must be recorded, and the recording of the closed portion of the meeting is exempt from public record requirements.¹⁷

The 2014 public necessity statement for the expanded exemptions provided that:¹⁸

Disclosing trade secrets would negatively impact the business interests of a private company that has invested substantial economic resources in developing [a flood loss] model, and competitor companies would gain an unfair competitive advantage if provided access to such information. Reliable projections of flood

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

See ss. 627.0628(3)(g)1. and 688.002(4), F.S.

⁸ Section 627.0628(3)(g)1., F.S.

⁹ There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See Attorney General Opinion 85-62 (August 1, 1985).

¹⁰ Section 627.0628(3)(g)2., F.S.

¹¹ *Id.*

¹² Chapter 2014-80, L.O.F.

¹³ Section 627.0628(3)(a), F.S.

¹⁴ Chapter 2014-98, L.O.F.

¹⁵ Section 627.0628(3)(g)1., F.S.

¹⁶ Section 627.0628(3)(g)2., F.S.

¹⁷ *Id.*

¹⁸ Section 2., ch. 2014-98, L.O.F.

losses are necessary in order to ensure that rates for flood insurance meet the statutory requirement that rates be neither excessive nor inadequate. This goal is served by enabling the commission, [OIR], and the consumer advocate to have access to all aspects of flood loss models and by encouraging private companies to submit such models to the commission, [OIR], and consumer advocate for review without concern that trade secrets will be disclosed through a public records request.

Pursuant to the Open Government Sunset Review Act, the public record and public meeting exemptions will repeal on October 2, 2019, unless reenacted by the Legislature.¹⁹

During the 2018 interim, subcommittee staff sent a questionnaire to the commission as part of its review under the Open Government Sunset Review Act. The commission recommended that the exemptions be reenacted in order to protect the business interests of private companies that develop hurricane and flood loss models, which must be available to the commission to ensure that rates for residential property insurance meet statutory requirements.

Effect of the Bill

The bill removes the scheduled repeal date of the public record and public meeting exemptions, thereby maintaining:

- The public record exemption for a trade secret used in designing and constructing a hurricane or flood loss model and provided by a private company to the commission, OIR, or the consumer advocate;
- The public meeting exemption for any portion of a commission meeting or of a rate proceeding on an insurer's rate filing at which such confidential and exempt trade secret is discussed; and
- The public record exemption for the recording of an exempt meeting.

B. SECTION DIRECTORY:

Section 1. amends s. 627.0628, F.S., relating to the commission; public record exemption; public meeting exemption.

Section 2. provides an effective date of October 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

¹⁹ Section 627.0628(3)(g)2.c., F.S.
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DATE: 4/8/2019

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.