



# The Florida Senate

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Committee on Banking and Insurance

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## **OPEN GOVERNMENT SUNSET REVIEW OF SECTION 624.23, F.S., CONSUMER COMPLAINTS AND INQUIRIES RECEIVED BY THE DEPARTMENT OF FINANCIAL SERVICES**

### **Issue Description**

Consumers may file complaints or make inquiries to the Department of Financial Services (DFS) regarding an insurance company or other person or entity regulated by the DFS or the Office of Insurance Regulation (OIR). In 2002, legislation was enacted to provide that specified personal and financial information of a consumer held by the DFS or the OIR relating to a consumer's complaint or inquiry regarding a matter regulated under the Florida Insurance Code is confidential and exempt from the public records law. Subsequently, in 2007, legislation was enacted that expanded the current exemption to include the same personal financial and medical information provided by consumers to the Division of Workers' Compensation of the DFS for the purpose of resolving disputes and complaints of employees.

This public records exemption is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2012, unless reviewed and saved from repeal through reenactment by the Legislature. Under this act, exemptions from s. 24, Art. I of the State Constitution are subject to repeal 5 years after their enactment unless reviewed and saved from repeal by the Legislature pursuant to the standards established under the act.

### **Background**

#### **Public Records**

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.<sup>1</sup> 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.<sup>2</sup> 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.

In addition to the State Constitution, the Public Records Act,<sup>3</sup> which pre-dates public records provision of the State Constitution, specifies conditions under which public access must be provided to records of an agency.<sup>4</sup> Section 119.07(1) (a), F.S., states:

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<sup>1</sup> Section 1390, 1391 F.S. (Rev. 1892)

<sup>2</sup> Article I, s. 24 of the State Constitution

<sup>3</sup> Chapter 119, F.S.

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

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

. . . all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.<sup>5</sup>

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

Only the Legislature is authorized to create exemptions to open government requirements.<sup>8</sup> 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.<sup>9</sup> A bill enacting an exemption<sup>10</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>11</sup>

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.<sup>12</sup> If a record is simply made exempt from disclosure requirements an agency is not prohibited from disclosing the record in all circumstances.<sup>13</sup>

The Open Government Sunset Review Act<sup>14</sup> provides for the systematic review, through a 5-year cycle ending October 2<sup>nd</sup> of the 5<sup>th</sup> year following enactment, of an exemption from the Public Records Act or the Public Meetings 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 or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is

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<sup>4</sup> 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.” The Florida Constitution also establishes a right of access to 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 those records exempted by law or the state constitution.

<sup>5</sup> Section 119.011(11), F.S.

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

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

<sup>8</sup> Article I, s. 24(c) of the State Constitution.

<sup>9</sup> *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).

<sup>10</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>11</sup> Art. I, s. 24 (c) of the State Constitution.

<sup>12</sup> Attorney General Opinion 85-62.

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

<sup>14</sup> Section 119.15, F.S.

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

- (1) Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- (2) 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
- (3) 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.<sup>15</sup>

The act also requires consideration of the following:

- (1) What specific records or meetings are affected by the exemption?
- (2) Whom does the exemption uniquely affect, as opposed to the general public?
- (3) What is the identifiable public purpose or goal of the exemption?
- (4) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- (5) Is the record or meeting protected by another exemption?
- (6) Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review 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.<sup>16</sup> The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

... notwithstanding s. 768.28 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.

### **Section 624.23, F.S. Exemption**

In 2002, legislation was enacted to provide that specified personal and financial information of a consumer held by the DFS or the OIR relating to a consumer's complaint or inquiry regarding a matter regulated under the Florida Insurance Code is confidential and exempt from the public records law. Disclosure of the exempted information is allowed to the National Association of Insurance Commissioners (NAIC) and other governmental entities if necessary to perform their duties and responsibilities. However the NAIC and other governmental entities must maintain the confidentiality and exempt status of the information.

Initially, s. 624.23, F.S., did not contain an exemption for the same personal financial and medical information provided by consumers to the Division of Workers' Compensation of the DFS for the purpose of resolving disputes and complaints of employees. Subsequently, in 2007 legislation was enacted that expanded the exemption to include the specified personal financial and health information provided to DFS and regulated under s. 440.191, F.S. (Workers' Compensation Employee Assistance and Ombudsman Office). Additionally, the 2007 legislation limited the scope of records applicable to the exemption by specifying the personal financial and health information considered confidential and exempt, based on the rules adopted by DFS and OIR. The exempt information includes consumers' personal health condition, disease, or injury and certain records relating to a

<sup>15</sup> Section 119.15(4)(b), F.S.

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

consumer's personal finances and insurance coverage. Furthermore, the 2007 legislation deleted bank account numbers, debit, and charge card numbers from the exemption since they were already exempt under the general exemption of s.119.071(5)(b), F.S.

These public records exemptions will repeal on October 2, 2012, unless reviewed and saved from repeal by reenactment by the Legislature.

## Findings and/or Conclusions

Section 624.23, F.S., creates a public records exemption for consumers' health and financial records collected by the DFS divisions of Agent and Agency Services, Consumer Services, and Workers' Compensation and by the OIR. The parties affected by this exemption include insurers, attorneys, researchers, prospective employers, consumers' who request assistance from the agencies, witnesses to the agencies' investigations, and beneficiaries of or applicants for any product or service regulated under the Florida Insurance Code or s. 440.191, F.S. (Workers' Compensation Employee Assistance and Ombudsman Office).

Other exemptions utilized by DFS and OIR, such as s. 626.601(6), F.S., and s. 440.125, F.S., cover similar information as s. 624.23, F.S.; however, the purposes of each exemption are unique. Under the exemption established in s. 626.601(6), F.S., any information obtained pursuant to an investigation by the DFS or OIR of any alleged improper conduct of an agent or other specified regulated entity is confidential and exempt until a formal administrative complaint, emergency order, or consent order against the licensee is filed by DFS or OIR. Section 624.23, F.S., continues the confidentiality of the personal financial and health information collected by the DFS or the OIR after it ceases under s. 626.601(6), F.S. In the context of workers' compensation, patient medical records made by health care providers may not be furnished to any person other than the patient or other specified persons, without written authorization except as provided in s. 440.13(4) (c), F.S. Medical records and medical reports of injured employees and any information contained in a medical report that identifies an injured employee provided to DFS are confidential and exempt under s. 440.125, F.S. Additionally, the federal Health Insurance Portability and Accountability Act<sup>17</sup> (HIPAA) provides privacy protection for health information but specifically applies to health plans, health providers and health care clearinghouses. Section 624.23, F.S., complements these exemptions and specifically applies to the personal and financial information collected by DFS and OIR.

The protection of personal financial and health information against identity theft and other misuse is the main purpose of s. 624.23, F.S. The exemption protects the information of consumers and injured employees who file complaints, witnesses, victims, and subjects of investigations, while encouraging the filing of consumer complaints without fear of retaliation. The agencies' role in maintaining the confidentiality of consumers' information is especially important in the context of an investigation due to the unintended harm that the release of information would cause complainants, witnesses, victims, or the subject of the investigation.

Under s. 624.23, F.S., the name and address of a complainant or the name of the insurer or other regulated entity that is the subject of the investigation or complaint are not exempt. Some concern has been expressed whether to expand the exemption to cover all of an injured worker's information provided to the Department of Financial Services Workers' Compensation division should be confidential and exempt. The concern arises from the Division providing certain information concerning injured workers, such as names and addresses, through monthly public records requests to approximately ninety law firms, who then send the workers mail solicitations. However, since the names and addresses of the workers are readily available through other means, expanding the exemption would be conflicting.

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<sup>17</sup> Public Law 104-191.

## **Options and/or Recommendations**

Based on the Open Government Sunset Review Act's criteria, the Banking and Insurance Committee professional staff recommends that the specified exemption be reenacted. The exemption is necessary for the effective and efficient protection of personal financial and health information against identity theft and other misuse.