

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: April 3, 1998 Revised: 4/4/98 \_\_\_\_\_

Subject: Confidentiality of Public Records and Public Meetings for the Florida Automobile Joint Underwriting Association

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Emrich</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/1 amendment</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

**I. Summary:**

Under Article I, s. 24 of the State Constitution, ch. 119, F.S., the Public Records Law, and s. 286.011- 286.012, F.S., the Government in the Sunshine Law, records and meetings of public bodies must be open to the public. The Attorney General has issued an opinion which concludes that the Florida Windstorm Underwriting Association is subject to these laws. The Attorney General's rationale is equally applicable to the Florida Automobile Joint Underwriting Association (FAJUA).

This bill provides that the FAJUA is subject to the Public Records and Government in the Sunshine laws. The bill exempts from disclosure certain records relating to open claims files, underwriting files, open internal audits, privileged attorney-client communications, proprietary information, employee records, and ongoing negotiations. The bill also exempts portions of meetings relating to open claims files and underwriting files from the Government in the Sunshine law. A court reporter must record all closed meetings and those notes must be retained by the FAJUA for 5 years. A copy of the transcript of closed portions of meetings, less any exempt matters during which claims are discussed, becomes public after the claim is settled.

This bill provides a public necessity statement for the exemptions, as is required by Art. I, s. 24, State Constitution, and the exemptions are made subject to the Open Government Sunset Review Act of 1995.

This bill amends section 627.311 of the Florida Statutes.

## II. Present Situation:

### A. Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The first law affording access to public records was enacted by the Florida Legislature in 1909.<sup>1</sup> In 1992, Floridians voted to adopt an amendment to the State Constitution that raised the statutory right of public access to public records to a constitutional level. Art. I, s. 24, State Constitution, expresses Florida's public policy regarding access to public records by providing 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.

The Public Records Law<sup>2</sup> specifies the conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies. The Public Records Law states that, unless specifically exempted, all agency<sup>3</sup> records are to be 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>4</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,

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<sup>1</sup>Section 1, ch. 5942 (1909).

<sup>2</sup>Chapter 119, F.S.

<sup>3</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."

<sup>4</sup>Section 119.011(1), F.S.

communicate or formalize knowledge.<sup>5</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>6</sup>

The Constitution does, however, permit the Legislature to create exemptions by general law. The general law exempting a public record must state with specificity the public necessity justifying the exemption and can be no broader than necessary to accomplish the stated purpose of the law. Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>7</sup>

Section 119.15, F.S., which was enacted prior to Art. I, s. 24, State Constitution, provides that an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of 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:

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 to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; 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 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.

## **B. Public Meetings Law**

Article I, s. 24, State Constitution, expresses Florida's public policy regarding access to public meetings by providing that:

All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, city, school district, or special district, at which official

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<sup>5</sup>*Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>6</sup>*Wait v. Florida Power & Light Company*, 372 So.2d 420 (1979).

<sup>7</sup>Article I, s. 24(c) of the State Constitution.

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.

The Constitution, however, permits the Legislature to provide by general law for the exemption of meetings from the requirements of this section. The general law exempting access to public meetings must state with specificity the public necessity justifying the exemption and can be no broader than necessary.

### **C. Applicability of the Public Records and Public Meetings Laws to the Florida Automobile Joint Underwriting Association**

On April 12, 1994, in response to a request from the Insurance Commissioner, the Attorney General issued Attorney General's Opinion 94-32, wherein he concluded that the Florida Windstorm Underwriting Association is subject to the Public Records Law and the Government in the Sunshine Law. The Attorney General relied on several leading cases construing these laws,<sup>8</sup> as well as a series of earlier Attorney General's Opinions.

The Florida Windstorm Underwriting Association (FWUA) is a private, nonprofit entity created pursuant to statute for the purpose of providing windstorm coverage when such coverage is otherwise unavailable in certain areas of the state.<sup>9</sup> The association is subject to regulation and supervision by the Department of Insurance. With respect to the Government in the Sunshine Law, the Attorney General noted that private organizations are generally not subject to that law, but that the law has been held applicable to such organizations to avoid circumvention of the statute. In determining whether the law applied, the Attorney General considered “. . . all the factors relating to the responsibilities of the private entity and the public agency.”<sup>10</sup> Previously, the Attorney General had opined that Enterprise Florida, Inc., a statutorily-created corporation with duties prescribed by statute,<sup>11</sup> was subject to the Government in the Sunshine Law,<sup>12</sup> and that a nongovernmental advisory committee appointed by a private nonprofit corporation for the purpose of providing technical advice with respect to recodification of county zoning laws was also subject to that law.<sup>13</sup> Because “. . . the FWUA is created pursuant to a plan adopted by departmental rule, which carries out a governmental function through a board supervised by the department . . . ,” the Attorney General concluded that the Government in the Sunshine Law applies to the FWUA.

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<sup>8</sup>See, e.g., *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (Fla. 1969), *Times Publishing Co. v. Williams*, 222 So.2d 470 (Fla. 2d DCA 1969), *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971), *Wood v. Marston*, 442 So.2d 934 (Fla. 1983).

<sup>9</sup>Section 627.351, F.S.

<sup>10</sup>AGO 94-32 at 693.

<sup>11</sup>Section 288.901, F.S.

<sup>12</sup>AGO 92-80.

<sup>13</sup>AGO 83-95.

In determining whether the Public Records Law applied, the Attorney General considered the creation, funding, regulation, decision-making process, and goals of an entity.<sup>14</sup> In light of the same considerations that led to the conclusion that the FWUA was subject to the Government in the Sunshine Law, the Attorney General ruled that the FWUA was subject to the Public Records Law.

Furthermore, the Attorney General has opined that the non-profit corporation, Shared Market Insurance Services, Inc., (SMISI) like the Florida Residential Property and Casualty Joint Underwriting Association (RPCJUA), is subject to the public records law.<sup>15</sup> The RPCJUA is an insurance mechanism created pursuant to s. 627.351, F.S., to provide residential property insurance coverage to property owners within the state who are unable to secure such coverage in the private marketplace. In 1993, SMISI was established and is subordinate to and supervised by the RPCJUA.

The Florida Legislature passed a law in 1995 establishing public records and public meetings exemptions for the RPCJUA.<sup>16</sup> The exemptions in this bill are substantially the same as those created for the RPCJUA. The key difference is that the RPCJUA provision allows for release of information to the Market Assistance Plan under s. 627.3515, F.S.

Like the FWUA and RPCJUA, the Florida Automobile Joint Underwriting Association (FAJUA) is a nonprofit entity created by statute for the public purpose of providing insurance where otherwise unavailable, operating under a plan approved by the Department of Insurance.<sup>17</sup> Accordingly, it could be concluded that the Public Records Law and the Government in the Sunshine Law are applicable to the FAJUA.

The laws governing the FAJUA<sup>18</sup> do not contain any exemptions from the Government in the Sunshine Law or the Public Records Law.

### III. Effect of Proposed Changes:

**Section 1.** The bill amends s. 627.311, F.S., and specifies that the Florida Automobile Joint Underwriting Association (FAJUA) is subject to the public records requirements of chapter 119, F.S., and the public meetings requirements of s. 286.011, F.S. The following records held by the FAJUA are made confidential and exempt:

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<sup>14</sup>AGO 94-32 at 694; *see also* AGO 92-37.

<sup>15</sup>AGO 95-58.

<sup>16</sup>*See* Chapter 95-233, Laws of Florida.

<sup>17</sup>Section 627.311, F.S.

<sup>18</sup>Sections 627.311 and 627.351(1), F.S.

1. Underwriting files (except that a policyholder or applicant has access to his or her own underwriting files).
2. Claims files, until termination of all litigation and settlement of all claims arising out of the same incident; however, confidential claims files may be released to governmental agencies upon written request and demonstration of need; such records held by the receiving agency remain confidential and exempt as provided for in the bill.
3. Records obtained or generated by an internal auditor. If the report is pursuant to a routine audit, the report is confidential until the audit is completed; if the report is part of an investigation, it is confidential until the investigation is closed or ceases to be active. "Active" is defined under the bill.<sup>19</sup>
4. Matters reasonably encompassed in privileged attorney-client communications.
5. Proprietary information licensed to the FAJUA under contract, if the contract provides for the confidentiality of such information.
6. Information relating to the medical condition or medical status of a FAJUA employee which is not relevant to the employee's capacity to perform his or her duties, and records relating to an employee's participation in an employee assistance program designed to assist any employee who has a behavioral or medical disorder, substance abuse problem, or emotional difficulty which affects the employee's job performance.
7. Information relating to negotiations for financing, reinsurance, depopulation, or contractual services, until the conclusion of the negotiations.
8. Minutes of closed meetings regarding underwriting files or open claims files until termination of all litigation and settlement of all claims with regard to that claim, except that otherwise confidential or exempt information must be redacted, i.e., blacked out in the copy to be released.

This bill also provides that an insurer considering underwriting a risk insured by the FAJUA may have access to relevant underwriting files and claims files provided the insurer agrees in writing, notarized and under oath, to maintain their confidentiality. The FAJUA may also release the following information to insurance agents, who must maintain the confidentiality of the information: name, address, and telephone number of the automobile owner or insured, location of the risk, rating information, loss history, and policy type.

In addition to these exemptions, this bill provides for confidentiality of those portions of meetings in which confidential underwriting files or confidential open claims files are discussed. These

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<sup>19</sup>Page 3, line 7 of the bill provides that an investigation is considered to be "active" while the investigation is being conducted with a reasonable, good-faith belief that it could lead to the filing of administrative, civil, or criminal proceedings.

closed portions of meetings must be recorded by a court reporter. No portion of a closed meeting may be off the record. The FAJUA must retain the court reporter's notes for at least 5 years. A copy of the transcript of closed portions of meetings, less any exempt matters, during which claims are discussed, becomes public after the claim is settled.

These exemptions are made subject to the Open Government Sunset Review Act of 1995, s. 119.15, F.S., and will be repealed on October 2, 2003, unless reviewed and saved from repeal through reenactment by the Legislature.

**Section 2.** Provides a public necessity statement for the exemptions as is required by Art. I, s. 24, State Constitution. The public necessity statement provides that employee medical records contain personal, sensitive information that would harm an employee if disclosed; that underwriting files contain personal financial and medical information the disclosure of which would harm insureds, in addition to proprietary confidential business information; that disclosure of privileged attorney-client communications could jeopardize litigation or other business matters; that disclosure of open claims files would result in higher awards and settlements to be paid by the FAJUA and ultimately the consumer; that disclosure of information relating to ongoing audits or investigations would jeopardize investigations and may result in the release of inaccurate information; and, that disclosure of information relating to negotiations for financing, reinsurance, depopulation, or contractual services be exempt because the parties with which the FAJUA is negotiating would have an economic advantage over the FAJUA, thereby increasing costs to the consumer.

**Section 3.** Provides that the act takes effect upon becoming a law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

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

The bill creates exemptions from the requirements of Art. I, s. 24, State Constitution, ch. 119, F.S., and ss. 286.011- 286.012, F.S. As is required, the bill provides a statement of public necessity for the exemptions.

##### **C. Trust Funds Restrictions:**

None.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

As stated in the public necessity statement of the bill under section 2, if the records and meetings made confidential by the bill were not exempt from the Government in the Sunshine and Public Records laws, claimants would have unfettered access to evidence, negotiation strategies, and claim evaluation and settlement considerations, and, as a result, the amount of the awards and settlements paid out by the FAJUA, and ultimately the premiums paid by consumers, would likely increase.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

#1 by Governmental Reform and Oversight:

Technical amendment removing the word “must” and inserting the word “shall.”