

# 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.)

BILL: CS/SB 1278

SPONSOR: Committee on Banking and Insurance and Senator King

SUBJECT: Florida Windstorm Underwriting Association-Confidentiality of Public Records and Meetings

DATE: March 14, 2000

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Emrich</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>RC</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

Under the Public Records Law, the Government in the Sunshine Law, and Article I, Section 24 of the State Constitution, 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 (FWUA) is subject to these laws.

Committee Substitute for Senate Bill 1278 provides that certain records and meetings of the FWUA are confidential and exempt from the Public Records and Government in the Sunshine laws. Specifically, the bill exempts from disclosure certain records relating to underwriting and claims files, internal audits, privileged attorney-client communications, proprietary information, employee records, responses to requests for proposals, and negotiations relating to debt financing transactions. The bill provides a public necessity statement for the exemptions, as is required by Article I, s. 24, of the State Constitution, and the exemptions are made subject to the Open Government Sunset Review Act of 1995.

The exemptions in this CS are similar to those created in 1995 for the Residential Property and Casualty Joint Underwriting Association by chapter 95-233, Laws of Florida and those created in 1998 for the Florida Automobile Joint Underwriting Association under chapter 98-315, Laws of Florida.

This CS does not have a fiscal impact on state or local governments.

This CS substantially amends s. 627.351, Florida Statutes.

## II. Present Situation:

### Public Records Law

Article I, s. 24 of the Florida Constitution expresses Florida's public policy regarding access to government records by providing that:

Every person has the right to inspect or copy any public records 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 Constitution does, however, permit the Legislature to provide by general law for the exemption of records from the requirements of section 24. The general law exempting the records 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.

Public policy regarding access to government records is addressed under section 119.07, F.S., which provides that:

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 or the custodian's designee.

Section 119.15, F.S., provides that an exemption may be created or maintained only if it serves an identifiable public purpose, may be no broader than is necessary to meet the public purpose it serves, 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.

### Public Meetings Law

Article I, s. 24 of the Florida 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 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 does, however, permit the Legislature to provide by general law for the exemption of meetings from the requirements of section 24. However, as noted above for public records, 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. Section 286.011, F.S.,

states the provisions for access to public meetings and further provides that s. 119.15, F.S., outlined above, governs the exemption provisions for access to public meetings.

### **Applicability of the Public Records and Public Meetings Laws to the Florida Windstorm Underwriting Association**

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 (ch. 70-234, Laws of Florida). The association is subject to regulation and supervision by the Department of Insurance. 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. In determining whether the Public Records Law applied, the Attorney General considered the creation, funding, regulation, decision-making process, and goals of an entity (AGO 94-32 at 694; *see also* AGO 92-37). 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.

This CS is patterned after the existing public records exemption for the Residential Property and Casualty Joint Underwriting Association (RPCJUA) which was passed in 1995 (ch. 95-233, Laws of Florida). Like the FWUA, the RPCJUA is a state created insurance mechanism authorized to provide residential property insurance coverage to property owners within the state who are unable to secure such coverage in the private marketplace. Many of the written documents in the possession of the FWUA contain personal information about policyholders which if disclosed could be harmful to those persons. Further, disclosure of attorney-client communications could jeopardize litigation or other business matters involving the FWUA. Finally, the FWUA engages in sophisticated financing in order to pay claims and it is necessary to keep certain financial matters confidential until such matters are finalized.

### **III. Effect of Proposed Changes:**

**Section 1.** Amends s. 627.351, F.S., to specify the following FWUA records are confidential and exempt from the public records requirements of chapter 119, F.S., and s. 24 (a), Art. I of the State Constitution. (Substantial differences from the current public records exemptions for the RPCJUA are noted.)

1. Appraisals, surveys, applications and other information relating to a policyholder's property, information relating to property coverages and the property insurer, applications for coverage, and all information included in underwriting files, except that a policyholder shall have access to all this information. (The current provision relating to the RPCJUA states that "underwriting files" are confidential and exempt, except that a policyholder shall have access to his or her own files.)
2. Claims files, until termination of all litigation and settlement of all claims arising out of the same incident; however, confidential and exempt 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 CS.

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 CS.
4. Matters reasonably encompassed in privileged attorney-client communications.
5. All proprietary information and data, including computer models, and all data that is a trade secret defined under s. 812.081, F.S., licensed to the FWUA as part of a response to a request for proposals from vendors to perform certain financial services, or under contract, if the response or contract provides for the confidentiality of such information. (The current RPCJUA provision states that proprietary information is confidential and exempt which is licensed to the association under contract and the contract provides for the confidentiality of such proprietary information.)
6. Information relating to the medical condition or medical status of a FWUA employee which is not relevant to the employee's capacity to perform his or her duties, and information relating to workers' compensation, insurance benefits, and retirement or disability benefits.
7. 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 that affects the employee's job performance.
8. Information relating to responses to requests for proposals from vendors to perform financial or other specialized services, until the successful vendor is selected or the request for proposal is withdrawn by the association. (Under the current RPCJUA provision, information relating to negotiations for financing, reinsurance, depopulation, or contractual services is confidential and exempt until the conclusion of the negotiations.)
9. When an authorized insurer is considering assuming or taking out a risk insured by the FWUA, relevant underwriting and claims files can be released to the insurer if that insurer agrees in writing under oath to keep such information confidential. (There is no similar provision under the current RPCJUA law.)

In addition to these exemptions, this CS provides for confidentiality as to meetings, pursuant to s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution, attended by two or more members of the board of the FWUA with lenders, rating agencies and others relating to debt financing by the association when the debt financing has been approved by the board of directors at a public meeting. Additionally, portions of meetings of the FWUA are exempt wherein confidential underwriting or claims files are discussed. All portions of such closed meetings shall be recorded by a court reporter and such records shall be retained by the FWUA for at least 5 years. A copy of the transcript, less any exempt matters, will become public as to individual claims after the claim is settled. (Under the current RPCJUA law, minutes of closed meetings regarding underwriting files and open claims files are confidential and exempt until termination of all litigation and settlement

of all claims with regard to that claim, except that the information otherwise confidential or exempt by law will be redacted.)

The provisions noted above do not preclude the Department of Insurance from obtaining information from the FWUA. (There is no similar provision under the current RPCJUA law.)

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, 2005, 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 Article I, Section 24 of the State Constitution. The public necessity statement provides that FWUA records be held confidential and exempt, that association employee medical records likewise be exempt because they contain personal, sensitive information that would harm an employee if disclosed. That appraisals and other information relating to policyholders and underwriting files be exempt because disclosure would harm insureds and that such files contain proprietary confidential business information. Further, 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 FWUA and ultimately the consumer; that disclosure of information relating to audits or investigations would jeopardize investigations and may result in the release of inaccurate information; and, that it is in the public interest that meetings between the FWUA board of directors and lenders be exempt from the public meetings law regarding debt financing.

**Section 3.** Provides that the act takes effect July 1, 2000.

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

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

None.

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

This CS provides that certain records and meetings of the FWUA are confidential and exempt from the Public Records and Government in the Sunshine laws. Specifically, the CS exempts from disclosure certain records relating to underwriting and claims files, internal audits, privileged attorney-client communications, proprietary information, employee records, responses to requests for proposals, and negotiations relating to debt financing transactions. The CS provides a public necessity statement for the exemptions, as is required by Article I, s. 24, of the State Constitution, and the exemptions are made subject to the Open Government Sunset Review Act of 1995. Since the CS relates only to public records and meetings exemptions, it complies with the requirements of s. 24, Art. I of the State Constitution.

**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 CS under Section 2, if the records and meetings made confidential by the CS 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 FWUA, and ultimately the premiums paid by consumers, could possibly increase.

**C. Government Sector Impact:**

The Department of Insurance may obtain information from the FWUA which is made exempt and confidential under this CS.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.