

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1026

SPONSOR: Banking and Insurance Committee

SUBJECT: Public Records Exemption related to Surplus Lines Insurance

DATE: March 13, 2001 REVISED: _____

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

I. Summary:

This bill reenacts and expands the current public records exemption and confidentiality for certain surplus lines insurance records submitted by surplus lines insurance agents to the Department of Insurance, as provided by s. 626.921(8), F.S. The current exemption is scheduled for repeal on October 2, 2001, unless reviewed and reenacted by the Legislature, pursuant to the criteria specified in the Open Government Sunset Review Act, s. 119.15, F.S.

Presently, if requested by the department, surplus lines agents are required to submit copies of policies, applications, and other specified information related to the surplus lines policies written. The information must be maintained for 5 years and available for inspection by the department. Any information obtained by the department that would reveal a trade secret, as defined in s. 688.002, is exempt from the public records law and confidential. As currently interpreted, any information that is specific to an individual policy or policyholder is considered a trade secret. The bill clarifies this by revising the exemption to apply to information that reveals information specific to a particular policy or policyholder, rather than information that reveals a trade secret.

The bill also expands the exemption by applying it to information furnished to the Florida Surplus Lines Service Office (“Service Office”) under the Surplus Lines Law (ss. 626.913-626.937, F.S.), if the disclosure would reveal information specific to a particular policy or policyholder. The Service Office was created by the Legislature in 1997 and is authorized by s. 626.921, F.S., to require surplus lines agents to submit such information as required by the association’s plan of operation, approved by department rule. The plan requires surplus lines agents to submit detailed information about each surplus lines policy written. By referring to information furnished to the Service Office “under the Surplus Lines Law,” this bill also conforms to CS/SB 658, that amends sections 626.923, 626.930, and 626.931, F.S., to authorize the Service Office to have the same access to records of surplus lines agents as currently provided to the Department of Insurance and to require surplus lines agents to report specified information.

This bill substantially amends section 626.921, Florida Statutes.

II. Present Situation:

Constitutional Access to Public Records and Meetings

Article I, s. 24 of the State Constitution provides every person with 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. The section specifically includes the legislative, executive, and judicial branches and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissioners or entities created pursuant to law or the State Constitution.

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records provided that: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

The Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years and must state that the exemption must be reviewed by the Legislature before the scheduled repeal date. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.

In the 5th year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd of the 5th year, unless the Legislature acts to reenact the exemption.

Under the requirements of the Open Government Sunset Review Act, an exemption is to be maintained only if: (1) the exempted record or meeting is of a sensitive, personal nature concerning individuals; (2) the exemption is necessary for the effective and efficient administration of a governmental program; or (3) the exemption affects confidential information concerning an entity.

As part of the review process, s. 119.15(4)(a), F.S., requires the consideration of the following specific questions: (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?

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption: (1) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption; (2) protects information of a sensitive personal nature concerning individuals, the release of which information 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; 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.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. In addition, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Surplus Lines Insurance

The Florida Insurance Code contains the Surplus Lines Law in ss. 626.913-626.937, F.S. The purpose of this law is to provide access to insurance coverage that cannot be obtained from insurers authorized to sell insurance in Florida. The law establishes requirements for approval of *eligible* surplus lines insurers and licensure of surplus lines agents by the Department of Insurance. The law also specifies the conditions that must be met before insurance coverage may be *exported* to an eligible surplus lines insurer, also referred to as a *nonadmitted* insurer. Surplus lines insurance is not subject to Florida regulation of rates or forms and there is no insurance guaranty fund protection if the insurer becomes insolvent. Surplus lines insurance is subject to a 5 percent premium tax paid by the policyholder and a 0.3 percent fee to fund the Florida Surplus Lines Service Office.

The Florida Surplus Lines Service Office

Legislation in 1997 created the Florida Surplus Lines Service Office, a nonprofit association to act as a “self-regulating organization” to permit better access by consumers to approved surplus lines insurers. (Ch. 97-196, L.O.F.) The Insurance Commissioner appoints a board to operate the association and the department must approve its plan of operation. All surplus lines agents are required to be members of the association, which employs a full-time staff and maintains its office in Tallahassee. The office is funded by a fee on surplus lines policies equal to 0.3 percent of the premium.

The Florida Surplus Lines Service Office is required to receive, record, and review all surplus lines insurance policies; maintain records of the reported policies; prepare monthly reports for the department; prepare and deliver to each surplus lines agent quarterly reports of the agent’s business and collect and remit to the department the surplus lines tax; and report to the department a reconciliation of the policies written in the surplus lines market, as reported by surplus lines insurers and surplus lines agents.

Filing Requirements for Surplus Lines Agents

Surplus lines agents are required to report and file with the Florida Surplus Lines Service Office such information on each surplus lines insurance policy as required in the plan of operation [s. 626.921(2), F.S.] The plan of operation specifies that information on policies shall be submitted in a format approved by the department. The *Agents Procedures Manual*, adopted by order of the department, requires agents to submit to the Service Office specific information on each policy within 21 days of the effective date, including the name and address of the insured and insurer, the type of coverage, amount of coverage, the premium, effective date, fees charged, deductibles, and other information.

Surplus lines agents are also required by statute to submit a quarterly report to the service office that includes aggregate gross and net premiums and a listing of all policies issued. (s. 626.931, F.S.) In practice, however, the quarterly report of aggregate data is no longer required, because agents must report detailed information on each policy, as described above. But, the quarterly affidavit of efforts to place the coverage is still required.

If requested by the *department*, surplus lines agents are required to submit copies of policies, applications, certificates, confirmation of coverage, memoranda, and any changes or endorsements. (s. 626.923, F.S.) Similarly, surplus lines agents are required to maintain in their office for 5 years, open to examination by the *department*, each surplus lines contract, including applications and certificates, confirmation of coverage, memoranda, any substitutions or endorsements, the amount of the insurance and perils insured against, brief description and location of property insured, premium charged, return premium paid, effective date and terms of the contract, name and address of the insured and the insurer, amount collected from the insured, and other information as may be required by the department. (s. 626.930, F.S.) The department typically requests such information only if it is investigating an agent for a suspected violation, such as non-payment of the surplus lines tax, misappropriation of funds, or improper placement of business in the surplus lines market.

The current law does not expressly provide the Florida Surplus Lines Service Office with the same right of access to records that is provided to the department. But, the *Agents Procedure Manual*, adopted by the Service Office and by department order, requires that the surplus lines insurance agents' records specified above also be open to examination by the Service Office.

Filing Requirements for Surplus Lines Insurers

Each foreign insurer (formed under the laws of another state) is required to file a quarterly report with the Service Office of all surplus lines insurance transacted in Florida during the quarter. Similarly, each alien insurer (formed under the laws of another country) must file a report with the Service Office of all surplus lines insurance transacted, but reported annually, rather than quarterly. [s. 626.931(4) and (5), F.S.]

Surplus lines insurers and adjusters are currently required to notify the Service Office upon receipt of any claim notice reported under a surplus lines policy. The Service Office is required to determine whether the policy has been filed as required by this section. [s. 626.921(2), F.S.]

Public Records Exemption for Information Reported by Surplus Lines Agents

Information that surplus lines agents submit to the Department of Insurance, upon request, pursuant to s. 626.923, F.S., and information available to inspection by the department under s. 626.930, F.S., is confidential and exempt from the Public Records Law, if the disclosure of the information would reveal a trade secret as defined in s. 688.002, F.S. The exemption does not apply to any proceeding instituted by the department against an agent or insurer. This exemption is scheduled for repeal on October 2, 2001, unless reenacted by the Legislature, after review under the Open Government Sunset Review Act. [s. 626.921(8), F.S.]

Trade secret is defined in s. 688.002(4), F.S., as information that “(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.”

It may not be clear what information submitted by surplus lines agents is considered a trade secret, but it is interpreted as applying to information that is specific to an individual policy, as opposed to aggregate information such as quarterly premium and tax reports.

Prior to the creation of the Florida Surplus Lines Service Office in 1997, surplus lines agents were required to submit quarterly reports to the department, including aggregate premiums and a listing of all policies issued. [s. 626.931 (1995 Fla. Stat.)] There was no automatic filing requirement for the policy forms themselves or other detailed information about each policy, other than the information required to be provided upon request or examination by the department. The law did not provide a public records exemption for the quarterly reports, but did provide an exemption for the information submitted to the department pursuant to request or examination if the disclosure of the information would reveal a trade secret.

The 1997 legislation creating the Surplus Lines Service Office required surplus lines agents to file quarterly reports with the service office, rather than with the department. (s. 626.931, F.S., as amended by s. 4 of ch. 97-196, L.O.F.). Also, the act amended s. 626.921, F.S., to require surplus lines agents to file with the service office such information on each policy as required in the plan of operation adopted by the board and approved by the department. The 1997 act did not provide a public records exemption for the information agents were required to submit to the Florida Surplus Lines Service Office. But, the public records exemption was maintained for information submitted by agents to the department, pursuant to request or examination, if disclosure would reveal a trade secret.

Whether the Florida Surplus Lines Service Office is a “Public Agency” for purposes of the Public Records Law

The Office of the Attorney General has issued numerous opinions advising that if a nonprofit entity is created by law, it is subject to Chapter 119 public records disclosure requirements. (See, *Government in the Sunshine Manual*, 2000 Ed., Office of the Atty. Gen., pp. 57-63.) The Attorney General concludes that the issue is whether the entity is acting on behalf of an agency. (Id., p. 60.) One opinion determined that the Florida Windstorm Underwriting Association, a private nonprofit association established pursuant to a plan adopted by the Department of

Insurance in accordance with statutory authorization, is subject to the Public Records Law (AGO 94-32).

These opinions indicate that the Florida Surplus Lines Service Office is subject to the Public Records Law. The service office essentially performs a regulatory function on behalf of the department by collecting the data necessary to determine if surplus lines agents are paying the appropriate surplus lines tax and assisting the department in enforcement of other surplus lines laws. It may be argued that the current exemption for certain surplus lines records submitted to the department also applies to the service office as an agent of the department. But, even if the current exemption applies to the service office, the law references information submitted to the department pursuant to request under s. 626.923, F.S., or contained in the records subject to examination under s. 626.930, F.S., but does not refer to information required to be filed with the service office under s. 626.921(2), F.S., which is the statutory authority for mandatory reporting by agents to the service office of information on each surplus lines policy sold.

Answers to Questions Posed by the Open Government Sunset Act

Section 119.15(4)(a), F.S., requires as part of the review process the consideration of specific questions, listed above. For a complete report on these issues, see *Review of Public Records Exemption for Surplus Lines Insurance Records Furnished to the Department of Insurance* (Mandatory Review 2001-028, by the Committee on Banking and Insurance). In summary, the current exemption may be categorized under s. 119.15(4)(b)3., F.S., which permits an exemption that protects information of a confidential nature which protects 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. Surplus lines insurance agents' lists of policyholders and specific policy information is proprietary in nature and its disclosure to competitor insurance companies could detrimentally affect their business.

III. Effect of Proposed Changes:

The bill reenacts the current public records exemption and confidentiality for certain surplus lines insurance records submitted by surplus lines insurance agents to the Department of Insurance upon request or examination, as provided by s. 626.921(8), F.S. The bill revises the exemption to apply to records that reveal information *specific to a particular policy or policyholder*, rather than information that would reveal a *trade secret*. This is considered a clarifying change because, in practice, the current exemption for information that reveals a trade secret is interpreted as applying to information specific to a particular policy or policyholder.

The bill expands the current public records exemption by applying it to information furnished to the Florida Surplus Lines Service Office under the Surplus Lines Law (ss. 626.913-626.937, F.S.), if the disclosure would reveal information specific to a particular policy or policyholder. The exemption would not prevent the disclosure of any information by the Service Office to the department, but the exemption applies to records obtained by the department from the Service Office. The exemption would also not apply to any proceeding instituted by the department against an agent or insurer. By referring to information furnished to the Service Office "under the Surplus Lines Law," the bill would also conform to CS/SB 658 as discussed in Related Issues, below.

The new provision containing the public records exemption for the Service Office would be scheduled for repeal in 5 years, on October 2, 2006, unless reviewed and saved from repeal pursuant to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S.

The bill makes legislative findings of public necessity to justify the public records exemption and confidentiality, finding that the disclosure of information specific to a particular policy or policyholder would be harmful to insurers or agents due to the economic value of such information if revealed to competitors, and that such information may also reveal economic information about the policyholder that would be harmful as an invasion of privacy of the policyholder.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years and must state that the exemption must be reviewed by the Legislature before the scheduled repeal date. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. This bill expands a current exemption and, as required, provides for future repeal on October 2, 2006, subject to review by the Legislature.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

By providing a public records exemption and confidentiality for policy-specific surplus lines insurance records, the bill protects the economic value of such information to insurers and agents which could be lost if revealed to competitors.

C. Government Sector Impact:

None

VI. Technical Deficiencies:

None.

VII. Related Issues:

This bill conforms to CS/SB 658, as reported favorably by the Banking and Insurance Committee, by referring to information furnished to the Florida Surplus Lines Service Office “under the Surplus Lines Law” which includes sections 626.913-626.937, F.S. Under current law, s. 626.921 authorizes the Service Office to obtain records from surplus lines agents, but CS/SB 658 amends sections 626.923, 626.930, and 626.931, F.S., to authorize the Service Office to have the same access to records of surplus lines agents as currently provided to the Department of Insurance and to require surplus lines agents to report specified information that conforms to requirements in the *Agents Procedural Manual* adopted by the Service Office and approved by order of the department.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
