

STORAGE NAME: h1699s1.in.doc
DATE: April 16, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
INSURANCE
ANALYSIS**

BILL #: CS/HB 1699
RELATING TO: Public Records
SPONSOR(S): Committee on Insurance; Representative(s) Waters

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) INSURANCE YEAS 12 NAYS 1
 - (2) STATE ADMINISTRATION
 - (3) COUNCIL FOR COMPETITIVE COMMERCE
 - (4)
 - (5)
-

I. SUMMARY:

Under Article I, Section 24, Florida Constitution, records and meetings of public bodies must be open to the public in the absence of an express exemption.

In 1994, the Attorney General issued an opinion concluding that the Florida Windstorm Underwriting Association—a property insurer of last resort created by the Legislature in 1970—is subject to these laws.

The bill would exempt certain records of the Florida Windstorm Underwriting Association from the public records. The Florida Windstorm Underwriting Association would not be required to make the following records available for public copying or inspection:

- information relating to a policyholder's property, including information in underwriting files;
- claims files, until the termination of litigation arising out of the same incident;
- records obtained or generated by internal audits, until the audit is completed;
- matters reasonably encompassed within privileged attorney-client communications;
- proprietary information;
- employee records relating to medical condition or participation in assistance programs; and
- information relating to the negotiations for financing, reinsurance, depopulation, or contractual services, until the negotiations end.

In prior years, the Legislature has exempted similar records of two other residual market insurers.

This bill also would create an exemption from the public records law for work papers for insurance company investigations or market conduct examinations prepared by the Department of Insurance or the insurance regulatory entities of other states.

These exemptions would be subject to the Open Government Sunset Review Act of 1995 and stand repealed on October 2, 2006, unless reenacted by the Legislature.

This bill would not have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

B. PRESENT SITUATION:

Government-in-the-Sunshine

In 1992, Floridians voters approved an open government amendment to the State Constitution, elevating the right of public access to public records and public meetings from a statutory to a constitutional right. Under Article I, s. 24, of the State Constitution:

“(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”

“(b) All meetings of any collegial public body of the executive branch of state government . . . 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”

Exemptions from s. 24, Art. I of the State Constitution are permitted. Article I, s. 24(c), of the State Constitution, requires:

- The Legislature to create exemptions in general law;
- A law creating an exemption to specifically state the public necessity justifying the exemption; and
- That an exemption be no broader than necessary to accomplish the stated purpose of the law.

Further, the Open Government Sunset Review Act of 1995,¹ provides that an open record or open meeting 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.” Under the Act, an “identifiable public purpose is served if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government that cannot be accomplished without the exemption and the exemption meets one of the following purposes:

¹ Section 119.15, F.S.

- The exemption allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- The exemption 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
- The exemption 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.

Any bill containing an exemption may not contain other substantive provisions, although it may contain multiple exemptions relating to one subject.²

Public Records

*Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted the first law affording access to public records in 1909.*³

In addition to Article I, s. 24 of the State Constitution, the Public Records Law⁴ 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 agency⁵ records are to be available for public inspection and copying. The term "public record" is 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.*⁶

The Florida Supreme Court has interpreted this definition as encompassing all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.⁷ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁸

Florida Windstorm Underwriting Association

² Article I, s. 24(c), of the State Constitution.

³ Section 1, ch. 5942 (1909).

⁴ Chapter 119, F.S.

⁵ 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."

⁶ Section 119.011(1), F.S.

⁷ Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So. 2d 633, 640 (Fla. 1980).

⁸ Wait v. Florida Power & Light Company, 372 So.2d 420 (1979).

The Legislature created the Florida Windstorm Underwriting Association in 1970 as an “insurer of last resort” for the purpose of making windstorm insurance coverage available in certain eligible geographic areas of the state to those unable to procure it from a voluntary market insurer. It operates as an association composed of all authorized insurers writing property insurance on a direct basis in this state.⁹ The Department of Insurance regulates the Florida Windstorm Underwriting Association. As of February 2001, the Florida Windstorm Underwriting Association had 430,388 policies-in-force.

On April 12, 1994, the Attorney General issued Attorney General's Opinion 94-32 in response to the following question submitted by then-Insurance Commissioner Tom Gallagher:

“Is the Florida Windstorm Underwriting Association subject to the Government in the Sunshine Law (Section 286.011, F.S.) and the Public Records Law (Chapter 119)?”

The Attorney General concluded that the Florida Windstorm Underwriting Association is subject to both laws. The Attorney General was of the opinion that the Florida Windstorm Underwriting Association is (1) subject to the ‘dominion and control’ of the Commissioner of Insurance and, therefore, subject to the open meetings law, and (2) an “agency,” and therefore subject to the public records law.

The Legislature has exempted a variety of different types of records held by two other insurers of last resort—the Residential Property and Casualty Joint Underwriting Association in 1995 and the Florida [Automobile] Joint Underwriting Association in 1998—from the public records law. These records include claims files; underwriting files; matters encompassed in attorney-client communications; proprietary information; certain records revealing the medical condition of an employee or employee participation in employee assistance programs; information relating to negotiations for financing, reinsurance, depopulation, or contractual services; and minutes of closed meetings. Portions of meetings of both associations where confidential underwriting files or confidential open claims files are discussed also are exempt from the open meetings law.

Work Papers of the Department of Insurance

Under ss. 624.316 and 624.3161, F.S., the Department of Insurance has the authority to conduct market conduct exams and investigations of insurance companies. The work papers of the Department of Insurance are considered public record.

C. EFFECT OF PROPOSED CHANGES:

Public Records

Florida Windstorm Underwriting Association

Certain Florida Windstorm Underwriting Association records would be classified as confidential and exempt from the Public Records Law. As a result, the Florida Windstorm Underwriting Association would not be required to permit the public to copy or inspect the following records:

- 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. A policyholder would have access to this information. *[Stated justification for exemption: disclosure could harm insureds; also these files contain proprietary confidential business information.]*

⁹ The FWUA is regulated pursuant to s. 627.351(2), F.S.

- Claims files, until termination of all litigation or settlement of all claims arising out of the same incident. Confidential and exempt claims files could be released to governmental agencies upon written request and demonstration of need. These records held by the receiving agency would remain confidential and exempt. [*Stated justification for exemption: the release of information could result in higher awards and settlements to be paid by the Florida Windstorm Underwriting Association and ultimately the consumer.*]
- Records obtained or generated by an internal auditor. If the report were pursuant to a routine audit, the report would be confidential until the audit was completed. If the report were part of an investigation, it would be confidential until the investigation was closed or rendered inactive. [*Stated justification for exemption: the release of the information could jeopardize investigations and could result in the release of inaccurate information.*]
- Matters reasonably encompassed in privileged attorney-client communications. [*Stated justification for exemption: the release of this information could jeopardize litigation or other business matters.*]
- All proprietary information and data, including computer models, and all data that is a trade secret as defined under s. 812.081, F.S., licensed to the Florida Windstorm Underwriting Association as part of a response to a request for proposals to perform certain financial services, or under contract, if the response or contract provides for the confidentiality of such information. [*Stated justification for exemption: the type and quality of information received by the FWUA would be limited and inadequate.*]
- Information relating to the medical condition or medical status of an Florida Windstorm Underwriting Association 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. [*Stated justification for exemption: this information containing personal, sensitive information could harm an employee if disclosed.*]
- Records relating to an Florida Windstorm Underwriting Association employee's participation in an employee assistance program designed to assist an employee who has a behavioral or medical disorder, substance abuse problem, or emotional difficulty that affects the employee's job performance [*Stated justification for exemption: they contain personal, sensitive information that could harm an employee if disclosed.*]
- Information relating to the negotiations for financing, reinsurance, depopulation, or contractual services, until the negotiations end. [*Stated justification for exemption: those contracting with the association would have an economic advantage.*]

Were an authorized insurer considering assuming or taking out a risk insured by the Florida Windstorm Underwriting Association, relevant underwriting and claims files could be released to the insurer if the insurer or licensed agent agreed in writing, under oath, to keep the disclosed information confidential.

Department of Insurance Work Papers

The work papers of the Department of Insurance and of another state's insurance regulatory authority relating to an insurance company investigation or a market conduct examination would be exempt from public records requirements. [*Stated justification for exemption: examination reports are confidential until filed; investigation reports are confidential until the investigation is completed.*]

Sunset Review

The public records exemptions would be made subject to review in accordance with the Open Government Sunset Review Act and stand repealed on October 2, 2005, unless reviewed and saved from repeal through reenactment by the Legislature.

Statement of Public Necessity

As required by Article I, s. 24, Florida Constitution, the bill would include a public necessity statement.

D. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

III. 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

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 11, 2001, the Committee on Insurance adopted an amendment to the bill and reported HB 1699 as a committee substitute. CS/HB 1699 differs from the bill as filed in the following ways:

- An additional exemption from the public records law for the work papers prepared by the Department of Insurance or another state's insurance regulatory entity for use by the Department of Insurance in an insurance company investigation or a market conduct exam would be created.
- The exemption from the open meetings law for certain FWUA meetings would be removed. As a result of this amendment, all FWUA meetings would remain subject to the open meetings law.
- The Department of Insurance would not be precluded from obtaining access to records from the FWUA.

The public necessity statement for the exemption for the Florida Windstorm Underwriting Association would be amended to add a public necessity statement for the provision of the bill exempting proprietary information from the public records requirements.

VII. SIGNATURES:

COMMITTEE ON INSURANCE:

Prepared by:

Staff Director:

Meredith Woodrum Snowden

Stephen T. Hogge