

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 2218

SPONSOR: Banking and Insurance Committee and Senator Rossin

SUBJECT: Public Records Exemption for Specified Work Papers of the Department of Insurance and Records of the Florida Windstorm Underwriting Association

DATE: April 24, 2001 REVISED: _____

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

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. The Legislature may grant exemptions by general law.

Committee Substitute for Senate Bill 2218 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. The bill would also exempt certain records of the Florida Windstorm Underwriting Association (FWUA) from the public records provisions. The FWUA 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. Further, the bill provides for a statement of public necessity and states that the

exemptions would be subject to the Open Government Sunset Review Act of 1995 and stand repealed on October 2, 2006, unless reviewed and reenacted by the Legislature.

This bill substantially amends sections 624.319 and 627.351, Florida Statutes.

II. Present Situation:

Government-in-the-Sunshine

In 1992, Floridian 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, 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:

- 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.

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.

In addition to Article I, s. 24 of the State Constitution, the public records law 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 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.

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. All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.

Examinations and Investigations by the Department of Insurance

Under present law, the department is authorized to conduct examinations of insurers as to transactions, accounts, and records which relate directly or indirectly to the insurer (s. 624.316, F.S.). Examinations of domestic insurers must be conducted not less frequently than once every three years and under certain specified circumstances, once every five years. In lieu of making its own examination, the department may accept a full report of the last recent examination of a foreign insurer, certified to by the insurance official of another state. Examinations of alien insurers are limited to the insurer’s insurance transactions in the United States, except as otherwise required by the department.

The department also conducts market conduct investigations relating to insurers as often as it deems necessary (s. 624.3161, F.S.). Market conduct examinations are done for the purpose of ascertaining compliance with applicable provisions of the Insurance Code.

The department’s work papers consist of the information obtained, procedures applied (e.g., audits, evaluations, tests, schedules, flow charts), and conclusions reached during these examinations and investigations, and as such, these work papers are considered to be public records.

According to representatives with the department, the examination and investigation work papers of most other state insurance departments remain confidential during and after the completion of the examination or investigation. The department regularly participates in multi-state examinations and investigations when insurers are active across state boundaries and thus, the

absence of a work paper confidentiality provision in Florida law impairs the department's ability to fully participate in multi-state examinations or investigations of insurers.

Florida Windstorm Underwriting Association

The Legislature created the Florida Windstorm Underwriting Association (FWUA) 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. The FWUA offers coverage only for windstorm and hail losses, and only in those areas where the department determined that windstorm coverage was unavailable and that certain economic conditions existed. Coverage was initially limited to the coastal areas of eight counties, which was expanded to areas in 23 counties by the time of Hurricane Andrew in 1992, and now includes coastal areas in 29 of Florida's 35 coastal counties. As of March 31, 2001, the FWUA has 429,672 policies representing an exposure of \$93.3 billion with a probable maximum loss (PML) of \$5 billion for a 100-year storm.

On April 12, 1994, the Attorney General issued Attorney General's Opinion 94-32 in response to the following question submitted by 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.

III. Effect of Proposed Changes:

Section 1. Amends s. 624.319, F.S., relating to examination and investigation reports, to provide for a public records exemption pertaining to work papers, or portions thereof, prepared by the Department of Insurance or received from an insurance supervisory official of another state or federal agency for the use of the department in the performance of its examination or investigation duties pursuant to ss. 624.316 and 624.3161, F.S. Such information is confidential and exempt from s. 119.07(1) and s. 24(a) of Article I of the State Constitution.

This provision is subject to the Open Government Sunset Review Act and will be repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. Amends s. 627.351, relating to the Florida Windstorm Underwriting Association. Certain specified records of the FWUA would be classified as confidential and exempt from the public records provisions which relate to the following:

- 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. The stated justification for the exemption: disclosure could harm insureds; also these files contain proprietary confidential business information.
- 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. The records held by the receiving agency would remain confidential and exempt. The stated justification for the 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. However, if the report were part of an investigation, it would be confidential until the investigation was closed or rendered inactive. The stated justification for the 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. The stated justification for the 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. The stated justification for the 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. The stated justification for the 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. The stated justification for the 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. The stated justification for the 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. Also, the Department of Insurance would not be prohibited from obtaining access to FWUA records to which the department is otherwise entitled.

Section 3. Provides for a statement of public necessity as to the work papers of the Department of Insurance and provides that such exemption is necessary for the effective and efficient administration of a government program. Further, work papers are often incomplete and disclosure could harm the business of the regulated entity of an employee of that entity.

Section 4. Provides for a statement of public necessity which provides legislative justifications for the FWUA exemptions. (See section 2, above, for the rationale supporting the specified exemption.)

Section 5. Provides that the act will take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The provisions of the bill would protect insurers because the department work papers are oftentimes incomplete and could harm such insurers, if disclosed. The operations of the FWUA will be enhanced under the provisions of the bill.

C. Government Sector Impact:

The bill will aid the department in carrying out its examination and investigation functions.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

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