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 238

SPONSOR: Banking and Insurance Committee

SUBJECT: Public Records Exemption for Risk-Based Capital Information Furnished to the Department of Insurance

DATE: November 27, 2001 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Deffenbaugh	BI	Favorable/CS
2.				
3.				
4.				
5.				
6.				

I. Summary:

This committee substitute reenacts the public records exemption and confidentiality for certain risk-based capital information furnished to the Department of Insurance ("department") by insurers. The public records exemption for risk-based capital information submitted to the Department of Insurance by insurance companies, as required by s. 624.40851, F.S., is scheduled for repeal on October 2, 2002, unless reviewed and reenacted by the Legislature, pursuant to the criteria specified in the Open Government Sunset Review Act, s. 119.15, F.S.

The committee substitute does not substantially amend the current exemption; therefore, the future mandatory legislative review of the public records exemption is abrogated. In addition, the committee substitute provides conforming, technical changes.

In 1997, the Legislature enacted ch. 97-293, L.O.F., the risk-based capital requirements for insurers and confidentiality provisions for such information. The act instituted reporting and disclosure requirements for risk-based capital levels for domestic insurers based on a formula adopted by the National Association of Insurance Commissioners (NAIC). Insurers are required to internally monitor trigger levels and respond as necessary. A comparison of the insurer's actual capital level and its risk-based capital levels may trigger any of several levels of regulatory action by the Department of Insurance or supervision of corrective actions by the insurer. The exemptions terminate one year following the conclusion of any risk-based capital plan or revised risk-based capital plan or on the date of an order of seizure, rehabilitation, or liquidation pursuant to ch. 631, F.S.

The bill amends section 624.40851, 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.

Risk-Based Capital Reporting Requirements

In 1997, the Legislature enacted ch. 97-292, L.O.F., the NAIC's Risk-Based Capital for Insurers Model Act and ch. 97-293, which provides for the public records exemption for certain risk-based capital information. The risk-based capital reporting requirements and confidentiality provisions are contained in ss. 624.4085 and 624.40851, F.S., respectively, of the Florida Insurance Code. The act instituted reporting and disclosure requirements for risk-based capital levels for domestic insurers based on a formula adopted by the NAIC. According to the NAIC, "The RBC system was meant to replace fixed minimum capital and surplus standards with a more flexible system that increases minimum capital commensurate with risk…"

The NAIC established a program for accreditation of states in 1989. As of July 2001, 47 states were accredited. Nevada, New York, and West Virginia are not accredited. In order to be accredited, a state must adopt by law or rule the substance of a number of NAIC model laws and rules relating to insurer solvency. According to the NAIC, 47 of the United States' insurance jurisdictions have adopted laws or regulations that are substantially similar to the Risk-Based Capital for Insurers Model Act. The results of a staff review of some of the risk-based capital public records exemption laws indicated that California, District of Columbia, Illinois, Massachusetts, Nebraska, and North Carolina have adopted confidentiality provisions similar or identical to the NAIC model.

Accreditation of a state provides a benefit to insurers domiciled in that state. Because of accreditation, other accredited states accept Florida examination reports of Florida domestics. Other state laws may provide exemptions for insurers domiciled in accredited states; for example, Florida's insurance holding company law applies to Florida domestics and to insurers domiciled in nonaccredited states. Florida relies on the accreditation process to assure itself that insurers domiciled in other accredited states are adequately regulated as to solvency. Accreditation also provides a national system of solvency regulation, relying on each accredited state to regulate the solvency of its domestic insurers sufficiently to meet national standards. Under the provisions of s. 624.4085, F.S., insurers are required to internally monitor trigger levels and respond as necessary. A comparison of the insurer's actual capital level and its risk-

based capital levels may trigger any of several levels of regulatory action by the Department of Insurance or supervision of corrective actions by the insurer. Risk-Based Capital (RBC) analysis measures the minimum amount of capital necessary to support their overall business operations, given the size and risk profile of the respective companies. The capital requirements generally are assessed against four types of risk: (1) asset risk, (2) credit risk, (3) underwriting risk, and (4) off-balance sheet risk. Different risk-based capital calculations apply to life and health companies, property/casualty companies, and health maintenance organizations, since these entities operate in different economic environments.

According to the NAIC, the "…RBC formula produces a regulatory minimum amount of capital that is tailored to each specific company." The RBC formula is not meant to be used as a tool to compare or rank insurers. The risk-based capital system is just one of many tools a regulator uses for evaluating the solvency of an insurer. Insurers are prohibited from advertising the results of these calculations, and the department is prohibited from using the information in rate making. The department is authorized to use the reports solely for monitoring the solvency of insurers and assessing the need for corrective action with respect to insurers.

Public Records Exemption for Certain Risk-Based Capital Information Reported by Insurers

Section 624.40851, F.S., establishes the confidentiality of such risk-based capital information. The section specifically provides public records and public meetings exemptions for such information maintained by the Department of Insurance and for proceedings and hearings conducted by the department. The exemptions terminate one year following the conclusion of any risk-based capital plan or revised risk-based capital plan or on the date of an order of seizure, rehabilitation, or liquidation pursuant to ch. 631, F.S. The section also provides that proceedings, hearings, notices, correspondence, reports, records, or other information obtained upon the appointment of a receiver (for rehabilitation or liquidation) for the insurer by a court of competent jurisdiction are exempt from the provisions of s. 624.40851, F.S. This provision appears to be redundant because the section also provides that the public records exemption terminates on the date of an order of seizure, rehabilitation, or liquidation is entered.

However, s. 624.40851, F.S., does provide an exception to the confidentiality provision. The department is authorized to open such proceedings or hearings or provide a copy of the transcripts of such hearings or proceedings, or disclose other reports or records to a department or agency of this state or another state, if the department determines that the disclosure is necessary or proper for the enforcement of the laws of the United States or of this or another state.

The 1997 legislation enacting the public records exemption for certain risk-based capital information provided a statement of public necessity for such an exemption. The legislation provided that unrestricted public access to such information "…might damage the insurer if made available to its competitors and could substantially affect the solvency of an insurer." The legislation also provided that "…public access to such information would not serve a public interest in that such information could be misleading as to an insurer's ranking …" since other financial indicators and factors are also used to evaluate an insurer's solvency. Finally, the Legislature found that if such information was disclosed, it could reveal an insurer's investment

strategy and business decisions and therefore, place such an insurer at a competitive disadvantage in the marketplace.

Answers to Questions Posed by the Open Government Sunset Review Act
Section 119.15(4)(a), F.S., requires as part of the review process the consideration of specific questions, delineated above. For a complete report on these issues, see *Review of Public Records Exemption for Risk-Based Capital Information Furnished to the Department of Insurance* (Mandatory Review 2002-204, by the Committee on Banking and Insurance). In summary, the current exemption may be categorized under s. 119.15(4)(b), 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. Risk-based capital information submitted to the Department of Insurance is proprietary in nature and its disclosure to competitor insurance companies could detrimentally affect the company in the marketplace.

III. Effect of Proposed Changes:

Section 1. Amends s. 624.40851, F.S., to reenact the current public records exemption and confidentiality for certain risk-based capital records submitted to the Department of Insurance. Since the committee substitute does not substantially amend the current public records or meeting exemption, the provision requiring future legislative review is abrogated.

The bill removes the provision that exempts proceedings, hearings, notices, correspondence, reports, records, or other information obtained upon the appointment of a receiver (for rehabilitation or liquidation) for the insurer by a court of competent jurisdiction are exempt from the provisions of s. 624.40851, F.S. This provision appears to be redundant because the section also provides that the public records exemption terminates on the date of an order of seizure, rehabilitation, or liquidation is entered.

Section 2. Provides that the committee substitute takes effect October 1, 2002.

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 committee substitute does not expand the current exemption and would not be 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 certain risk-based capital information submitted by insurers to the department, the committee substitute protects the economic value of such information to insurers which could be lost if it was revealed to competitors.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.