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.)

Prepared By: Governmental Oversight and Productivity Committee

BILL: CS/SB 1586

INTRODUCER: Banking and Insurance Committee

SUBJECT: Open Government Sunset Review (Surplus Lines Insurance)

DATE: April 10, 2006 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Knudson	Deffenbaugh	BI	**Fav/CS**
2.	Rhea	Wilson	GO	**Favorable**
3.			RC	
4.				
5.				
6.				

I. Summary:

The Committee Substitute for Senate Bill 1586 re-enacts the current public records exemption for certain information concerning surplus lines insurance, which is specific to a particular policy or policyholder and is submitted to the Florida Surplus Lines Service Office (FSLSO) or the Department of Financial Services (DFS) or which is available for inspection by the department. The public records exemption is scheduled for repeal on October 2, 2006. The CS also makes technical and clarifying changes to the exemption.

Surplus lines insurance is insurance coverage provided by a company that is not licensed in Florida, but is allowed to transact insurance in the state as an "eligible" insurer. The purpose of the surplus lines law is to provide the insurance purchasing public with access to insurers that are not authorized to transact business in Florida when certain insurance coverages cannot be obtained from Florida-authorized insurers. Surplus lines agents are authorized to handle the placement of insurance coverages with surplus lines insurers, and are required to report and file with the FSLSO a copy of, or information on, each surplus lines insurance policy.

This bill re-enacts section 626.921(8) of the Florida Statutes.

II. Present Situation:

Public Records – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.[1] The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted

[1] Sections 1390, 1391, F.S. (Rev. 1892).

> . . . to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.[2]

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.[3] Article I, s. 24 of the State Constitution, provides that:

> (a) Every person[4] 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, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. . . .

Unless specifically exempted, all agency[5] records are available for public inspection. The term "public record" is broadly 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 to encompass 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]

Only the Legislature is authorized to create exemptions to open government requirements.[9] Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[10] A bill enacting an exemption[11] may not contain other

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[2] *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).
[3] Article I, s. 24 of the State Constitution.
[4] Section 1.01(3), F.S., defines "person" to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.
[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(11), 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 (Fla. 1979).
[9] Article I, s. 24(c) of the State Constitution.
[10] *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).
[11] Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

substantive provisions, although it may contain multiple exemptions that relate to one subject.[12] A bill creating an exemption must be passed by a two-thirds vote of both houses.[13]

The Public Records Act[14] specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

> 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.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.[15] The records custodian must state the basis for the exemption, in writing if requested.[16]

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.[17] If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[18] If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[19]

In *Ragsdale v. State*,[20] the Florida Supreme Court held that the applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record. Quoting from *City of Riviera Beach v. Barfield*,[21] a case in which documents were given from one agency to another during an active criminal investigation, the *Ragsdale* court refuted the proposition that inter-agency transfer of a document nullifies the exempt status of a record:

> "We conclude that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status. We believe that such a conclusion fosters the underlying purpose of section 119.07(3)(d), which is to prevent premature *public* disclosure of criminal investigative information since disclosure could impede an ongoing investigation or allow a suspect to avoid apprehension or escape detection. In determining whether or not to compel disclosure of active criminal investigative or intelligence information, *the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests*. Had the legislature intended the exemption for active criminal investigative

[12] Art. I, s. 24(c) of the State Constitution.
[13] *Ibid*.
[14] Chapter 119, F.S.
[15] Section 119.07(1)(b), F.S.
[16] Section 119.07(1)(c) and (d), F.S.
[17] *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5th DCA), rev. denied 892 So.2d 1015 (Fla. 2004).
[18] *Ibid* at 53, *see also*, Attorney General Opinion 85-62.
[19] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[20] 720 So.2d 203 (Fla. 1998).
[21] 642 So.2d 1135, 1137 (Fla. 4th DCA 1994).

> information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute." Although the information sought in this case is not information currently being used in an active criminal investigation, the rationale is the same; that is, that the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands. Thus, if the State has access to information that is exempt from public records disclosure due to confidentiality or other public policy concerns, that information does not lose its exempt status simply because it was provided to the State during the course of its criminal investigation.[22]

It should be noted that the definition of "agency" provided in the Public Records Law includes the phrase "and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency*" (emphasis added). Agencies are often authorized, and in some instances are required, to "outsource" certain functions. Under the current case law standard, agencies are not required to have explicit statutory authority to release public records in their control to their agents. Their agents, however, are required to comply with the same public records custodial requirements with which the agency must comply.

The Open Government Sunset Review Act - The Open Government Sunset Review Act[23] provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if 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. An identifiable public purpose is served if the exemption:

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- [p]rotects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- [p]rotects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not

[22] *Ragsdale*, 720 So.2d at 206 (quoting *City of Riviera Beach*, 642 So. 2d at 1137) (second emphasis added by *Ragsdale* court).
[23] Section 119.15, F.S.

> know or use it, the disclosure of which would injure the affected entity in the marketplace.[24]

The act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting by readily obtained by alternative means? If yes, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.[25] The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

> … notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Surplus Lines Insurance Coverage - Insurance companies that transact insurance in Florida or that have offices located in the state are required to obtain a certificate of authority, (COA) issued by the Office of Insurance Regulation pursuant to s. 624.401, F.S. Generally, an insurer that does not have a certificate of authority to transact insurance business in Florida and does so, is considered an unauthorized insurer and has committed insurance fraud. However, exceptions exist to the COA requirement, the primary one being for surplus lines insurers.

Surplus lines insurance is insurance coverage provided by a company that is not licensed in Florida, but is allowed to transact insurance in the state as an "eligible" insurer. The purpose of the surplus lines law is to provide the insurance purchasing public with access to insurers that are not authorized to transact business in Florida when certain insurance coverages cannot be obtained from Florida-authorized insurers.[26] Insurance may only be purchased from a surplus lines carrier if the necessary amount of coverage cannot be procured after a diligent effort[27] to

[24] Section 119.15(4) (b), F.S.
[25] *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).
[26] Section 626.913(2), F.S.
[27] See s. 626.914(4), F.S. A "diligent effort" is defined as seeking coverage from and being rejected by at least three authorized insurers that write the type of coverage being sought. The rejections must be documented.

buy the coverage from authorized insurers. Rates charged by a surplus lines carrier may not be more favorable than in use and offered by the majority of authorized insurers writing similar coverages on similar risks in Florida.[28]

Florida Surplus Lines Service Office

In 1997, the Legislature created the Florida Surplus Lines Service Office (Service Office or FSLSO), a non-profit association designed to act as a, "self-regulating organization" to permit better access by consumers to approved surplus lines insurers.[29] The Surplus Lines Service Office is governed by a nine person board of governors consisting of eight members appointed by the Department of Financial Services[30] with the insurance consumer advocate being the ninth member.[31] The FSLSO is required to perform its functions under a plan of operation that is subject to the approval of the Office of Insurance Regulation.

The Florida Surplus Lines Service Office is required to conduct the following activities:[32]

- Receive, record and review all surplus lines insurance policies;
- Maintain records of the policies reported to the service office and perform reports as required by the Financial Services Commission;[33]
- Prepare and deliver to each surplus lines agent quarterly reports of each agent's business;
- Collect and remit to the DFS the surplus lines tax as provided for in s. 626.932, F.S.;
- Reconcile the policies provided by non-admitted insurers with the policies reported to the service office by agents;
- Collect monthly from each surplus lines agent a service fee of .25 percent;[34]
- Other activities as specified by statute.

Florida Surplus Lines Agents

Surplus lines agents are authorized to handle the placement of insurance coverages with surplus lines insurers, and to place coverages with authorized insurers with whom the agent is not licensed.[35] Licensed resident general lines agents who meet the statutory criteria for licensure are eligible for licensure as a surplus lines agent.[36] In order to place a business with a surplus lines carrier, the agent must make a "diligent effort" to place the policy with a Florida-authorized insurer, which is shown by having three written rejections of coverage from insurers currently writing the type of insurance being sought.[37] Representatives from the FSLSO state that

[28] Section 626.916(1)(b), F.S.
[29] Ch. 97-196, L.O.F.
[30] Five members of the board are from the regular membership of the Florida Surplus Lines Association, one from each of the two largest domestic agents associations who are also licensed surplus lines agents, and a risk manager from a large domestic commercial enterprise.
[31] Section 626.921(4), F.S.
[32] See generally subsections (3) and (6) of s. 626.921, F.S.
[33] Currently, the Surplus Lines Office is required to prepare a "Quasar" report that includes new business reported by agents, policy cancellations, and policy renewals.
[34] See s. 626.921(3)(f), F.S. The Service Office is authorized to collect up to .3 percent of total gross premium. The fee is used to pay for the cost of operating the Service Office and is to be paid by the insurer.
[35] Section 626.914(1), F.S.
[36] Section 626.927, F.S. Generally, to be licensed as a surplus lines agent, an individual must be: (1) deemed by the DFS to have sufficient experience in the insurance business (2) have 1 year's experience working for a licensed surplus lines agent or have completed 60 class hours in an approved surplus lines course, and (3) pass a written examination.
[37] Section 626.914(4), F.S.

approximately 800 agents are currently licensed to transact surplus lines coverage, with about 440 agents actively reporting to the surplus lines office.

Surplus lines agents are required to report and file with the FSLSO a copy of or information on, each surplus lines insurance policy as required in the FSLSO board of governors' plan of operation.[38] Agents must comply with the Agents Procedure Manual adopted by the DFS, which requires agents to submit specific information on each policy including the name of the insured and insurer, the policy number and its effective date, the policy's expiration date, the zip code and county where the covered risk is located, the type of coverage, the premium, effective date, service fees and other information. Surplus lines agents are also required by statute to submit a quarterly report to the service office that includes an affidavit stating all surplus lines insurance transacted by the agent during the calendar quarter that has been submitted to the service office as required.[39] The affidavit must also include efforts made to place coverages with authorized insurers and the results of those efforts.

When requested by the DFS or the FSLSO, surplus lines agents are also required to submit to the service office an exact copy of any and all requested policies and other forms of confirming insurance policies[40] along with any substitutions or endorsements.[41] Upon request, the agent may also be required to submit the agent's memorandum as to the substance of any change represented by a substitute certificate, cover note, other form of confirmation of insurance coverage, or endorsement as compared with the coverage as originally placed or issued.[42] A request is typically only made by the department or surplus lines office for purposes of 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.

Surplus lines agents are required to maintain in their agency office for a period of 5 years each surplus lines contract, including applications and all certificates, and any substitutions or endorsements.[43] The information must include the amount of the insurance and perils insured against; the location of the insured property and a brief description; gross premium charged; return premium paid; rate of premium charged upon the several items of property; effective date of the contract and its terms; the name and post office address of the insured; the name and home-office address of the insurer; the amount collected from the insured; and other information that is required by the department. As noted, the department typically examines this information when an agent is being investigated for a suspected violation.

Public Records Exemptions for Information Reported by Surplus Lines Agents

The public records exemptions in s. 626.921(8), F.S., protect from disclosure information reported by surplus lines agents that would reveal information specific to a particular policy or policyholder. The exemption in paragraph (a) of s. 626.921(8), F.S., applies to information submitted to the Department of Financial Services. The information that surplus lines agents submit to the Department of Financial Services under s. 626.923, F.S., and information contained

[38] Section 626.921(2), F.S.
[39] Section 626.931, F.S.
[40] Such as applications, certificates, and cover notes.
[41] Section 626.923, F.S.
[42] See id.
[43] Section 626.930, F.S.

in records subject to examination by the DFS under s. 626.930, F.S., is confidential and exempt from the Public Records Law.

A second exemption for information furnished to the FSLSO under the Surplus Lines Law is contained in paragraph (b) of s. 626.921(8), F.S. This exemption does not prevent the disclosure of information by the FSLSO to the DFS, but the public records exemption does apply to records obtained by the DFS from the Surplus Lines Office. This second public records exemption for information furnished to the FSLSO shall stand repealed on October 2, 2006, unless reviewed in accordance with the Open Government Sunset Review Act[44] and reenacted by the Legislature.

Open Government Sunset Review of s. 626.921(8), F.S.
Senate Interim Project Report 2006-203 conducted an Open Government Sunset Review of the public records exemption contained in s. 626.921(8), F.S. The Open Government Sunset Review Act prescribes certain questions that must be considered by the Legislature in determining whether to reenact a public records exemption. Section 119.15(6)(a), F.S., requires as part of the review process the consideration of the following specific questions that were addressed in the interim project report:

What specific records or meetings are affected by the exemption?

- The statute specifies that "identifying information" contained in the information furnished to the Florida Surplus Lines Service Office under the Surplus Lines Law is confidential and exempt from public disclosure. Identifying information is defined in statute as information specific to a particular policy or policyholder. This is interpreted by the Florida Surplus Lines Service Office to include:
  - the name and address of the insured and the insurer,
  - the type of coverage in each policy,
  - the amount of coverage in each policy,
  - the premium charged,
  - the effective date of the policy,
  - fees charged,
  - deductibles.

Whom does the exemption uniquely affect?

- Insurance companies and insurance agencies are likely to be uniquely affected by this public records exemption, as it is these two groups that would most likely seek this information in order to learn the business practices of competitors and the location, financial practices and financial condition of potential customers. The exemption also affects surplus lines policyholders, since the information describes specific economic information about each surplus lines policy.

What is the exemption's public purpose or goal?

- The Legislature declared that the public purpose of the exemption for information specific to a particular policy or policyholder is that disclosure of such information "would be harmful to insurers or agents due to the economic value of such information if

[44] Section 119.15, F.S.

revealed to competitors. Such information may also reveal economic information about the policyholder that would be harmful as an invasion of privacy to the policyholder."[45]

Is the information otherwise readily obtainable?

- Representatives from the Florida Surplus Lines Service Office indicate to staff that the information held confidential under the public records exemption is not otherwise available. Information on each policy is generally only obtainable by the parties to the insurance contract (insurer and insured) and the surplus lines agent who facilitated the policy.

Is the record or meeting protected by another exemption?

- No. The public records exemption contained in s. 626.921(8)(b), F.S., is the only exemption in the Florida Statutes regarding information furnished to the Florida Surplus Lines Service Office under the Surplus Lines Law.

Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

- No. There are no other public records exemptions for information furnished to the Florida Surplus Lines Service Office under the Surplus Lines Law that could be combined with the exemption contained in s. 626.921(8)(b), F.S.

Pursuant to the analysis contained in Senate Interim Project Report 2006-203, staff of the Banking and Insurance Committee recommended that the public records exemption in s. 626.921(8), F.S., be maintained and re-enacted.

III. Effect of Proposed Changes:

Section 1. Reenacts and saves the public records exemption contained in s. 626.921(8), F.S, from repeal under the Open Government Sunset Review Act. The public records exemption is for information submitted to the Florida Surplus Lines Service Office (FSLSO), which is specific to a particular policy or policyholder. The section deletes the provision that provides for the repeal of the public records exemption.

The CS makes technical and clarifying changes to the public records exemption. In particular, it states that the FSLSO may disclose information specific to a particular policy or policyholder to the DFS in furtherance of the service office's duties and responsibilities.

Section 2. Provides that the act shall take effect October 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[45] Chapter 2001-181, L.O.F.

B. Public Records/Open Meetings Issues:

Yes. Reviewed in section II—Present Situation.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Failure to save the public records exemption contained in s. 626.921(8)(b), F.S., from repeal could result in harm to Florida citizens whose privacy would be invaded via the disclosure of their economic information that would be readily available to various parties. It would also harm insurance companies and insurance agencies, as their competitors would likely seek this information to learn their business practices and gain an economic advantage.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.