

# 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.)

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Prepared By: Banking and Insurance Committee

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BILL: SPB 7094

INTRODUCER: For Consideration by Banking and Insurance Committee

SUBJECT: Open Government Sunset Review/Consumer Complaints and Inquiries

DATE: February 12, 2007 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Deffenbaugh	BI	<b>Pre-meeting</b>
2.			GO	
3.				
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5.				
6.				

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## I. Summary:

This bill is the result of the Senate Interim Project Report 2007-202 (Open Government Sunset Review of Section 624.23, F.S., Personal Financial and Health Information in Consumer Complaints to Department of Financial Services or Office of Insurance Regulation). This section makes exempt from the public record requirements certain personal financial and health information of a consumer held by the Department of Financial Services (department) or the Office of Insurance Regulation (OIR) relating to a consumer's complaint or inquiry regarding a matter regulated under the Florida Insurance Code. Confidential and exempt information includes bank account numbers, debit, charge, and credit card numbers, and all personal financial and health information. However, this exemption does not include the name and address of an inquirer or complainant or the name of an insurer or other regulated entity that is the subject of the inquiry or complaint.

This section is subject to repeal on October 1, 2007 without legislative action to save it. As a result of the sunset review process, committee staff recommended that the exemption should be retained and revised. This bill retains the exemption; however, it makes the following revisions to the exemption:

- The bill narrows the current exemption by specifying what "other personal financial and health information" is confidential and exempt based the current definition of such information provided in rules adopted by the department and the OIR. Personal financial and health information would include a consumer's personal health condition, disease, or injury and certain records and information relating to a consumer's personal finances and insurance coverage.

- The exemption is expanded to include the same personal financial and medical information provided by consumers to the Division of Workers' Compensation of the Department of Financial Services for the purpose of resolving disputes and complaints of employees since this information is not confidential and exempt under ch. 440, F.S., of the Workers' Compensation Law.
- Bank account numbers and debit, credit, and charge card numbers are deleted from the exemption in the Florida Insurance Code since the general exemption, under s. 119.071(5)(b), F.S., already exempts these identical records from the Public Records Law.

This bill substantially amends the Florida Statute: Section 624.23.

## 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. In 1992, Florida adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>1</sup> Article I, s. 24 of the State Constitution, provides that:

(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, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. . .

The Public Records Law<sup>2</sup> 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.

Unless specifically exempted, all agency<sup>3</sup> 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.<sup>4</sup>

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,

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<sup>1</sup> Article I, s. 24 of the State Constitution.

<sup>2</sup> Chapter 119, F.S.

<sup>3</sup> 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...”

<sup>4</sup> Section 119.011(11), F.S.

communicate or formalize knowledge.<sup>5</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>6</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>7</sup> 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.<sup>8</sup> A bill enacting an exemption<sup>9</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>10</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. 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.<sup>11</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>12</sup>

The Open Government Sunset Review Act (act)<sup>13</sup> 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 Office of Legislative Services 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

<sup>5</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>6</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>7</sup> Article I, s. 24(c) of the State Constitution.

<sup>8</sup> *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).

<sup>9</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>10</sup> Art. I, s. 24(c) of the State Constitution.

<sup>11</sup> Attorney General Opinion 85-62.

<sup>12</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>13</sup> Section 119.15, F.S.

information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>14</sup>

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 be 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?

### **Department of Financial Services and the Office of Insurance Regulation – Consumer Inquiries and Complaints**

Consumers may file complaints with or make inquiries to the department or OIR concerning an insurance company or other entity regulated by the department or the OIR under the Florida Insurance Code. The Division of Consumer Services of the Department of Financial Services is primarily responsible for receiving inquiries and complaints from consumers and providing direct assistance and advocacy for consumers requesting such assistance or advocacy.<sup>15</sup> During fiscal year 2005-2006, the Division of Consumer Services received 55,522 complaints and inquiries.

According to the department representatives, when the department investigates the activities of insurance companies or other regulated entities, policyholders may provide the department with personal information relating to their insurance policies, which often includes financial or medical information. These investigations are often initiated due to complaints by an insured. Consumers may also contact the department about problems they have in obtaining insurance coverage and, as such, might submit medical or financial records. Often, a policyholder who has had an insurance claim denied will request assistance from the Division of Consumer Services. In providing background information relating to the claim, the insured may provide medical records detailing the history of the claim, such as medical records revealing health information supporting why the claim should be paid. The department provides the National Association of Insurance Commissioners (NAIC) with summary information concerning consumer complaints. The OIR contracts with private entities to provide certain services, such as market conduct examinations. In some instances, during the course of conducting examinations, these entities may obtain access to personal financial or medical information of consumers.

**Exemption Under Review** -- In 2002, legislation<sup>16</sup> was enacted that made confidential and exempt from public record requirements certain personal or financial information held by the department or OIR, or its service providers or agents, relating to a consumer's complaint or

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<sup>14</sup> Section 119.15(4) (b), F.S.

<sup>15</sup> Section 20.121(2)(h), F.S.

<sup>16</sup> Chapter 2002-175, L.O.F.

inquiry regarding a matter or activity regulated by the department or OIR.<sup>17</sup> Confidential and exempt information includes bank account numbers, debit, charge, and credit card numbers, and all other personal financial and health information of a consumer held by the department or office. However, this exemption does not include the name and address of an inquirer or complainant or the name of an insurer or other regulated entity that is the subject of the inquiry or complaint.

The law also provides exceptions to the public records exemption. Such confidential and exempt information and records may be disclosed to another governmental entity if disclosure is necessary for the receiving entity to perform its duties and responsibilities, and may be disclosed to the NAIC. The receiving governmental entity and the NAIC must maintain the confidential and exempt status of such information and records. Additionally, such confidential and exempt information and records may be used in a criminal, civil, or administrative proceeding so long as the confidential and exempt status of the information and records is maintained. This law is subject to an open government sunset review and the exemption will repeal, effective October 2, 2007, without legislative action to save it. (See Interim Project Report 2007-202 by the Committee on Banking and Insurance, which recommended retaining and revising the exemption.)

The law provides a public necessity statement, as required by Art. I, s. 24 of the State Constitution, which states that the exemption is necessary in order to protect the financial interest as well as the personal medical information of a person. Disclosure of such information could have a negative effect upon a person's business and personal relationships, and could have detrimental financial consequences, including identity fraud.

According to the department, law firms submit the majority of requests for public records. Generally, law firms request the names, addresses, and any other information on persons who have filed service requests with the Division of Consumer Services. This exemption protects the privacy of consumers providing sensitive financial and medical information to the department. In addition, if such personal and financial information was generally made available to the public, a person could be subject to identity theft and other misuses of personal and financial information.

Subsequent to the enactment of the public records exemption, the department and OIR adopted Rules 69J-128-025 and 69O-128.025, F.A.C., respectively, which define "personal financial and health information," as used in s. 624.23, F.S. "Personal financial and health information," is defined to mean information, which if disclosed would reveal:

- Any individual's personal health condition, disease, or injury;
- The existence, nature, source, or amount of any individual's personal income or expenses;
- Records of or relating to any individual's personal income or expenses;

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<sup>17</sup> Ch. 2002-175, L.O.F. The law originally made such records held by the Department of Insurance confidential and exempt. However, subsequent legislation was enacted in 2002 (Ch. 2002-404, L.O.F), effective January 1, 2003, which abolished the Department of Insurance, created the Department of Financial Services, and transferred the Division of Consumer Services of the Department of Insurance to this newly created department. The law also created the Office of Insurance Regulation, which is responsible for the regulation of insurance companies and other risk-bearing entities.

- Records of or relating to any individual's personal financial transactions of any kind;
- The existence, identification, nature, or value of any individual's assets, liabilities, or net worth;
- A history of any individual's personal medical diagnosis or treatment;
- The existence content, or status under any individual's beneficial interest in any insurance policy or annuity contract; or
- The existence, identification, nature, or value of any individual's interest in any insurance policy, annuity contract, or trust.

The rules adopted by the department and OIR, pursuant to their general rulemaking authority under s. 624.308, F.S., limit in some respects the scope of records that are deemed financial and personal information for purposes of s. 624.23, F.S., and therefore confidential and exempt from the Public Records Law. However, the statutory exemption contained in s. 624.23, F.S., provides "...all bank account numbers, and debit, charge, credit card numbers, and *all other personal financial and health information* of a consumer held by the department or office...are confidential and exempt..." Although the department and OIR have general rulemaking authority, pursuant to s. 624.308, F.S., Art. I, s. 24, of the State Constitution provides that public record exemptions may only be created by the Legislature in a general law. Further, Art. II, s. 3, of the State Constitution provides that no person belonging to one branch of government shall exercise any powers appertaining to either of the branches unless expressly provided. It is unclear whether the department and OIR have the authority to define, by rule, what records are within the scope of a public records exemption.

Concerns have been raised regarding the use of the broad exemption for "all other personal financial and health information," since these records are not defined or delineated in the law. The First Amendment Foundation has suggested that "other personal and financial information" held by the department and OIR should be identified in law to avoid constitutional issues of vagueness.<sup>18</sup> As noted earlier in the report, the department and OIR have adopted rules identifying what records constitute "other personal financial and medical information" for purposes of the exemption under s. 624.23, F.S.

The Division of Workers' Compensation of the Department of Financial Services is responsible for providing information and assistance to injured workers, employers, carriers, health care providers, and managed care arrangements.<sup>19</sup> The Employee Assistance and Ombudsman Office of the Division of Workers' Compensation is charged with the responsibility of facilitating and resolving disputes between an employee and the employer or carrier. Frequently, an employee will submit personal financial and medical information to support a claim for benefits or other documentation to assist in the resolution process. However, ch. 440, F.S., does not contain a public records exemption for such personal financial and medical information held by the Division of Workers' Compensation. Although consumers are providing personal and financial information to the Division of Workers' Compensation, which is located in the Department of Financial Services, the exemption under s. 624.23, F.S., does not apply to such information held by the Division of Workers' Compensation because ch. 440, F.S., is not part of the Florida

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<sup>18</sup> Letter from Barbara Petersen, President, First Amendment Foundation, to Jim Rhea, Senate Governmental Oversight and Productivity Committee (June 27, 2006) (copy on file with Banking and Insurance Committee staff).

<sup>19</sup> Section 440.192, F.S.

Insurance Code. Therefore, such sensitive financial and medical information provided by consumers to the division is not exempt from the public record requirements of ch. 119, F.S., even though this is the same type of information that is exempt if it is provided to the department regarding an activity regulated “under the Florida Insurance Code.”

Some of the specific records or information made confidential and exempt pursuant to s. 624.23, F.S., are redundant with an existing, general exemption found in s. 119.071(5), F.S. Section 119.071(5), F.S., provides that bank account numbers and debit, charge, and credit card numbers held by an agency are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. The First Amendment Foundation recommends deleting bank account numbers and debit, charge, and credit cards from the exemption in s. 624.23, F.S., since these records are already exempt under the general exemption found in s. 119.071(5), F.S.<sup>20</sup>

In the interim report, committee staff recommends reenacting the public records exemption provided in s. 624.23, F.S. However, staff recommends the following changes to the exemption:

- Narrow the current statutory exemption by specifying what “other personal financial and health information” is confidential and exempt based on the current definition provided in rules adopted by the department and the OIR;
- Expand the exemption to include the same personal financial and medical records relating to consumer complaints and inquiries received by the Division of Workers’ Compensation of the Department of Financial Services since such information is not currently confidential and exempt from the Public Records Law; and
- Delete bank account numbers and debit, credit, and charge card numbers from the exemption since the general exemption, under s. 119.071(5)(b), F.S., already exempts these records from the public.

### III. Effect of Proposed Changes:

**Section 1** amends s. 624.23, F.S., to retain and revise the current exemption for certain personal financial and health information relating to a consumer complaint or inquiry held by the Department of Financial Services or the Office of Insurance Regulation regarding an activity regulated under the Florida Insurance Confidential and exempt from the public records requirements of ch. 119, F.S., and Art. I, s. 24(a) of the State Constitution. The bill provides the following changes to this exemption:

- The bill narrows the current exemption by specifying what “other personal financial and health information” is confidential and exempt based the current definition of such information provided in rules adopted by the department and the OIR. Personal financial and health information would include a consumer’s personal health condition, disease, or injury and certain records and information relating to a consumer’s personal finances and insurance coverage.
- The exemption is expanded to include the same personal financial and medical information provided by consumers to the Division of Workers’ Compensation of the

<sup>20</sup> Letter from Barbara Petersen, President, First Amendment Foundation, to Jim Rhea, Senate Governmental Oversight and Productivity Committee (June 27, 2006) (copy on file with Banking and Insurance Committee staff).

- Department of Financial Services for the purpose of resolving disputes and complaints of employees since this information is not confidential and exempt under ch. 440, F.S., the Workers' Compensation Law.
- Bank account numbers and debit, credit, and charge card numbers are deleted from the exemption in the Florida Insurance Code since the general exemption, under s. 119.071(5)(b), F.S., already exempts these identical records from the Public Records Law.

Since the current exemption is expanded to include certain information submitted to the Division of Workers' Compensation, the bill also provides that this section is subject to the Open Government Sunset Review in accordance with s. 119.15, F.S., and will be repealed on October 2, 2012, unless reviewed and retained through enactment of the Legislature.

**Section 2** provides a public necessity statement for exempting a person's sensitive financial and health information. The disclosure of such information would create the opportunity for theft or fraud thereby jeopardizing the financial security of a person. The Legislature further finds that it is a public necessity that health information held by the department or the OIR, and information provided by employees to the Division of Workers' Compensation of the department be made confidential and exempt because matters of personal health are traditionally private and confidential concerns between the patient and health care provider.

**Section 3** provides this act will take effect on October 1, 2007.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

Section 119.15(6)(b), F.S., provides that

“. . . an exemption may be created, revised, or maintained only if it serves an identifiable public purpose, and the exemption may be no broader than is necessary to meet the public purpose it serves.”

This proposed committee bill is the result of an open government sunset review of s. 624.23, F.S. *See*, Interim Project Report 2007-202 by the Committee on Banking and Insurance. In that committee staff report, it was recommended that the exemption should be retained and modified.

##### **C. Trust Funds Restrictions:**

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The exemption would protect individuals from potential identity theft and fraud and other misuses of personal financial and medical information.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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

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## **VIII. Summary of Amendments:**

None.

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