

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 823 Public Records

**SPONSOR(S):** Government Operations Subcommittee; Insurance & Banking Subcommittee; Ingram

**TIED BILLS:** CS/CS/HB 821 **IDEN./SIM. BILLS:** CS/SB 834

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	13 Y, 0 N, As CS	Bauer	Cooper
2) Government Operations Subcommittee	11 Y, 0 N, As CS	Williamson	Williamson
3) Regulatory Affairs Committee	17 Y, 0 N	Bauer	Hamon

### SUMMARY ANALYSIS

CS/CS/HB 823, which is linked to CS/CS/HB 821, creates section 624.4212, F.S., to incorporate the necessary confidentiality elements for the Office of Insurance Regulation (OIR) to meet the National Association of Insurance Commissioners' accreditation standards.

The bill provides that proprietary business information held by OIR is confidential and exempt from public records requirements. OIR may disclose the confidential and exempt proprietary business information in certain circumstances. The bill also defines "proprietary information" for purposes of the public record exemption.

The bill provides for repeal of the exemption on October 2, 2018, unless reviewed and saved from repeal by the Legislature pursuant to the Open Government Sunset Review Act. It also provides a statement of public necessity as required by the State Constitution.

The bill provides that the act shall take effect on October 1, 2013, if the main bill (HB 821) or similar legislation is adopted in the same legislative session or an extension thereof and becomes law.

**Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill creates a new exemption; thus, it appears to require a two-thirds vote for final passage.**

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### Public Records Law

The State of Florida has a long history of providing public access to governmental records and meetings. The Florida Legislature enacted the first public records law in 1892.<sup>1</sup> One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>2</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. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Act,<sup>3</sup> which pre-dates the State Constitution's public records provisions, specifies conditions under which public access must be provided to records of an agency.<sup>4</sup> 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 copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency 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>5</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, communicate, or

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<sup>1</sup> Section 1390, 1391 F.S. (Rev. 1892).

<sup>2</sup> Fla. Const. art. I, s. 24.

<sup>3</sup> Chapter 119, F.S.

<sup>4</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 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." The Florida Constitution also establishes a right of access to 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 those records exempted by law or the State Constitution. *See supra* fn. 3.

<sup>5</sup> Section 119.011(12), F.S.

formalize knowledge.<sup>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>7</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>8</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>9</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>10</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>11</sup> A bill enacting an exemption<sup>12</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>13</sup>

### Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)<sup>14</sup> provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from the Public Records Act or the Public Meetings Law.

The Act states that an exemption may be created, revised, 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.<sup>15</sup> 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 exemption meets the three statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual under this provision.
- Protects 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 know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>16</sup>

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 are only statutory, as opposed to constitutional. Accordingly, the standards do not limit the Legislature because one session of the Legislature cannot bind another.<sup>17</sup> The Legislature is only limited in its review process by constitutional requirements.

### Public Records Exemptions and the Insurance Code

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<sup>6</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>7</sup> *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

<sup>8</sup> Florida Attorney General Opinion 85-62.

<sup>9</sup> *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991).

<sup>10</sup> *Supra* fn. 1.

<sup>11</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001); *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999).

<sup>12</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>13</sup> *Supra* fn. 1.

<sup>14</sup> Section 119.15, F.S.

<sup>15</sup> Section 119.15(6)(b), F.S.

<sup>16</sup> *Id.*

<sup>17</sup> *Straughn v. Camp*, 293 So. 2d 689, 694 (Fla. 1974).

The Insurance Code currently provides a number of public records exemptions relating to insurance-related information, including:

- Trade secret documents;<sup>18</sup>
- Risk-based capital information;<sup>19</sup>
- Information related to orders of supervision;<sup>20</sup> and
- Personal consumer and personal financial information.<sup>21</sup>

Section 624.319, F.S., makes OIR's examination and investigation reports and workpapers confidential during the pendency of an examination or investigation. This provision allows the OIR to share this information with other governmental entities (if disclosure is necessary for the receiving entity to perform its duties and responsibilities) and with the NAIC.

While there is no generic exemption for information claimed to be proprietary business information in the Florida Statutes, the Legislature has created a number of exemptions from ch. 119, F.S. for proprietary business information held by certain agencies. This term is generally defined by the statute creating the exemption, and frequently includes trade secrets.

Currently, the Insurance Code has a specific exemption relating to "proprietary business information" held by the OIR, but relates only to such information provided by a title insurance agency or insurer.<sup>22</sup>

### CS/CS/HB: Insurer Solvency

The Office of Insurance Regulation (OIR) is a member of the National Association of Insurance Commissioners (NAIC), an organization consisting of state insurance regulators. As a member of the NAIC, the OIR is required to participate in the organization's accreditation program. NAIC accreditation is a certification that legal, regulatory, and organizational oversight standards and practices are being fulfilled by a state insurance department. Once accredited, a member state is subject to a full accreditation review every five years. The OIR is slated for its accreditation review during the fall of 2013.

The NAIC also periodically reviews its solvency standards as set forth in its model acts, and revises accreditation requirements to adapt to evolving industry standards. The OIR has identified several model act components not found in the current Insurance Code, and which must be implemented in order for the OIR to maintain its accreditation this fall.

Among other NAIC model act components, House Bill 821 implements the following NAIC confidentiality requirements:

- *NAIC Property and Casualty Actuarial Opinion Model Law*  
Current law requires insurers to provide to OIR a statement of opinion on loss and loss adjustment expense reserves prepared by an actuary or a qualified loss reserve specialists, and supporting workpapers. Current law treats these documents as public.<sup>23</sup>

The NAIC model law provides that states must require insurers to provide *actuarial opinion summaries* and that the regulators must keep these summaries confidential. CS/CS/HB 821 adopts this requirement and states that "proprietary business information" contained in these summaries are confidential and exempt from public records disclosure, and provides protection from waiver of confidentiality to both property and casualty insurers and life and health insurers.

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<sup>18</sup> Section 624.4213, F.S. Even in the absence of a statutory exemption for particular trade secrets, s. 815.045, F.S., "should be read to exempt from disclosure as public records all trade secrets [as defined in s. 812.081(1)(c), F.S.]." *Sepro Corp. v. Florida Dep't of Environmental Protection*, 911 So.2d 792 (Fla. 1st DCA 2003), *review denied sub nom.*

<sup>19</sup> Section 624.40851, F.S.

<sup>20</sup> Section 624.82, F.S.

<sup>21</sup> Section 624.23, F.S.

<sup>22</sup> Section 626.94195, F.S.

<sup>23</sup> Section 624.424, F.S.

- *Model Holding Company Act & Regulations*

In response to the recent financial crisis, a NAIC workgroup focused on group supervision issues in the context of large insurers and their affiliates in their respective holding companies. The workgroup noted the corresponding regulatory need to enhance insurance regulators' ability to obtain and evaluate financial information from affiliates, especially regarding "enterprise risk."<sup>24</sup>

In adopting the NAIC model act, CS/CS/HB 821 will require persons seeking a controlling interest in an insurer or controlling company to file an annual enterprise risk report to OIR. The bill requires insurers agree to have the ultimate controlling person and all its affiliates to provide information regarding enterprise risk to the OIR, and provides that the filings and related documents filed pursuant to s. 628.801, F.S. (related to registration and regulation of insurance holding companies) are confidential and exempt from public disclosure.

CS/CS/HB 821 also provides that a controlling person of a domestic insurer may divest its controlling interest by providing notice to the OIR. CS/CS/HB 821 provides that this notice is confidential and exempt until the divestiture transaction is completed, unless the OIR, in its discretion, determines that confidential treatment interferes with enforcement of this section.

The NAIC also made establishment and participation in supervisory colleges an accreditation standard. Supervisory colleges are essentially interstate meetings for insurance regulators to focus on large insurers that write significant amounts of insurance in multiple jurisdictions. CS/CS/HB 821 provides for the OIR's participation in a supervisory college with other insurance regulators. This bill creates a public records exemption for proprietary business information as it may be found in information obtained by OIR pursuant to its participation in a supervisory college.

### **Effect of CS/CS/HB 823**

CS/CS/HB 823, which is linked to CS/CS/HB 821, incorporates the necessary confidentiality elements for OIR to meet NAIC accreditation standards.<sup>25</sup> The bill provides that proprietary business information held by OIR is confidential and exempt from public records requirements. OIR may disclose the confidential and exempt proprietary business information:

- If the insurer to which it pertains gives prior written consent;
- Pursuant to a court order;
- To the American Academy of Actuaries upon a request stating the information is for the purpose of professional disciplinary proceedings and specifying procedures satisfactory to OIR for preserving the confidentiality of the information;
- To other states, federal and international agencies, NAIC, and state, federal, and international law enforcement authorities, including members of a supervisory college, if the recipient agrees in writing to maintain the confidential and exempt status of the document, material, or other information and has verified in writing its legal authority to maintain such confidentiality; or
- For the purpose of aggregating information on an industry wide basis and disclosing the information to the public only if the specific identities of the insurers, or persons or affiliated persons, are not revealed.

The bill defines "proprietary business information" to mean information, regardless of form or characteristics, that is owned or controlled by an insurer, or a person or affiliated person who seeks acquisition of controlling stock in a domestic stock insurer or controlling company, and that:

- Is intended to be and is treated by the insurer or the person as private in that the disclosure of the information would cause harm to the insurer, the person, or the company's business operations and has not been disclosed unless disclosed pursuant to a statutory requirement, an

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<sup>24</sup> Enterprise risk is "any activity, circumstance, event, or series of events involving one or more affiliates of an insurer that, if not remedies promptly, is likely to have a material adverse effect upon the financial condition or liquidity of the insurer or its insurance company as a whole, including, but not limited to, anything that would cause the insurer's risk-based capital as set forth in [state statutory requirement] or would cause the insurer to be in a hazardous financial condition." Section 1(F) of the NAIC Model Insurance Holding Company System Regulatory Act.

<sup>25</sup> Bill analysis from the OIR (received March 9, 2013), on file with the Insurance & Banking Subcommittee staff.

order of a court or administrative body, or a private agreement that provides that the information will not be released to the public;

- Is not otherwise readily ascertainable or publicly available by proper means by other persons from another source in the same configuration as requested by the office; and
- Includes, but is not limited to:
  - Trade secrets as defined in s. 688.002, F.S.,<sup>26</sup> and that complies with s. 624.4213, F.S.<sup>27</sup>
  - Information relating to competitive interests the disclosure of which would impair the competitive business of the provider of the information.
  - The source, nature, and amount of the consideration used or to be used in carrying out a merger or other acquisition of control in the ordinary course of business, including the identity of the lender, if the person filing a statement regarding consideration so requests.
  - Information relating to bids or other contractual data the disclosure of which would impair the efforts of the insurer or its affiliates to contract for goods or services on favorable terms.
  - Internal auditing controls and reports of internal auditors.
  - The actuarial opinion summary required under s. 624.424(1)(b), F.S., and the documents, materials, and other information related thereto.
  - A notice filed with OIR by the person or affiliated person who seeks to divest controlling stock in an insurer pursuant to s. 628.461, F.S.
  - The filings required by s. 628.801, F.S., and all documents, materials, and other information related thereto.
  - The enterprise risk report required by ss. 628.461(3) and 628.801, F.S., and the documents, materials, and other information related to the enterprise risk report.
  - Information provided to or obtained by OIR pursuant to participation in a supervisory college established under s. 628.805, F.S.
  - Information received from another governmental entity or NAIC that is confidential or exempt if held by that entity for use by OIR in the performance of its duties.

The bill provides a statement of public necessity and for repeal of the exemption on October 2, 2018, unless reviewed and saved from repeal by the Legislature.

As indicated in the bill's statement of public necessity, public disclosure of proprietary business information would disadvantage insurers' competitive interests, particularly in proposed acquisitions, and in turn could lead to some insurers providing inaccurate or biased information to the OIR and an overall loss of confidence in the marketplace. Without this public records exemption, release of this information could impair the economic value of such information and result in financial loss to the proprietor.

#### B. SECTION DIRECTORY:

**Section 1** creates s. 624.4212, F.S., to create an exemption from public records requirements for proprietary business information submitted to OIR; defines the term "proprietary business information"; provides exceptions; provides for future legislative review and repeal.

**Section 2** provides a statement of public necessity as required by the State Constitution.

**Section 3** provides a contingent effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

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<sup>26</sup> Section 688.002(4), F.S., defines the term "trade secret" to mean information, including a formula, pattern, compilation, program, device, method, technique, or process that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

<sup>27</sup> Section 624.4213, F.S., creates a process for submitting trade secret documents to certain agencies, including marking each document as a trade secret.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See FISCAL COMMENTS section.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This public records exemption bill will have an indeterminate positive impact on the private sector by protecting insurers' proprietary business information.

D. FISCAL COMMENTS:

The bill likely could create a minimal fiscal impact on OIR, because staff responsible for complying with public record requests could require training related to creation of the new public records exemption. In addition, OIR could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the OIR.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

*Vote Requirement and Public Necessity Statement for Public Records Bills*

In order to pass a newly-created or expanded public records or public meetings exemption, Article I, s. 24 of the State Constitution requires 1) a two-thirds vote of each house of the legislature and 2) a public necessity statement. The bill contains a public necessity statement and will require a two-thirds vote for passage.

B. RULE-MAKING AUTHORITY:

None provided in the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 13, 2013, the Insurance & Banking Subcommittee considered and adopted two amendments and reported the bill favorably as a committee substitute. One amendment clarified that proprietary business information include trade secret documents which comply with the procedures set forth in s. 624.4213, F.S. The second amendment provided clarifying changes to the list of documents considered to be proprietary business information, and provided that documents related to the enterprise risk report, actuarial opinion summary, and holding company filings are confidential and exempt.

On March 27, 2013, the Government Operations Subcommittee adopted two amendments and reported the bill favorable as a committee substitute. The amendments:

- Clarified that the public record exemption is applicable to a trade secret as defined in the Uniform Trade Secrets Act; and
- Removed an outdated reference to the Open Government Sunset Review Act of 1995 and replace it with the Open Government Sunset Review Act.

This analysis is drafted to the committee substitute as passed by the Government Operations Subcommittee.