

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: CS/SB 834

INTRODUCER: Banking and Insurance and Senator Simmons

SUBJECT: Public Records/Proprietary Business Information/Office of Insurance Regulation

DATE: April 9, 2013

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|------------------|
| 1. | Matiyow | Burgess | BI | Fav/CS |
| 2. | Naf | McVane | GO | Favorable |
| 3. | | | RC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

Please see Section VIII. for Additional Information:

| | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

CS/SB 834, which is linked to CS/SB 836, creates a public records exemption 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 the OIR in accordance with its statutory duties relating to insurer solvency is confidential and exempt from public records requirements. The bill specifies circumstances under which such confidential and exempt information may be disclosed.

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 Florida Constitution.

Because this bill creates a new public records exemption, it requires a two-thirds vote of the members present and voting in each house of the Legislature for final passage.

The bill creates section 624.4212 of the Florida Statutes.

II. Present Situation:

Public Records Laws

The Florida Constitution provides every person 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 of persons acting on their behalf.¹ The records of the legislative, executive, and judicial branches are specifically included.²

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act³ guarantees every person's right to inspect and copy any state or local government public record⁴ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁵

Only the Legislature may create an exemption to public records requirements.⁶ Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.⁷ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions⁸ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.⁹

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁰ It

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ Chapter 119, F.S.

⁴ Section 119.011(12), F.S., defines "public records" 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." Section 119.011(2), F.S., defines "agency" to mean as "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 Public Records Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)).

⁵ Section 119.07(1)(a), F.S.

⁶ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential and* exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances (*see WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 2004); and *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991)). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption (*see Attorney General Opinion* 85-62, August 1, 1985).

⁷ FLA. CONST., art. I, s. 24(c).

⁸ The bill may, however, contain multiple exemptions that relate to one subject.

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ Section 119.15, F.S. 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 (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.¹¹ The Act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary to meet such public purpose.¹²

Office of Insurance Regulation

The Office of Insurance Regulation (OIR) is part of the Financial Services Commission (commission), which is composed of the Governor and Cabinet members. The OIR is responsible for activities of the commission relating to regulation and investigation of violations of the Insurance Code,¹³ which governs insurance institutions.¹⁴

National Association of Insurance Commissioners

The 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 next accreditation review during the fall of 2013.

Supervisory Colleges

Supervisory colleges are essentially interstate meetings for insurance regulators to focus on large insurers that write significant amounts of insurance in multiple jurisdictions.

Public Records Exemptions and the Insurance Code

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

- Trade secret documents;¹⁵
- Risk-based capital information;¹⁶
- Information related to orders of supervision;¹⁷ and
- Personal consumer and personal financial information.¹⁸

¹¹ Section 119.15(3), F.S.

¹² Section 119.15(6)(b), F.S.

¹³ Comprised of ss. 624.01-624.24, F.S.

¹⁴ See s. 20.121(3)(a)1., F.S.

¹⁵ 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.]." *Seapro Corp. v. Florida Dep't of Environmental Protection*, 911 So.2d 792 (Fla. 1st DCA 2003), *review denied sub nom.*

¹⁶ Section 624.40851, F.S.

¹⁷ Section 624.82, F.S.

¹⁸ Section 624.23, F.S.

Section 624.319, F.S., makes OIR's examination and investigation reports and workpapers confidential during the pendency of an examination or investigation. The exemption 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 general statutory exemption for information claimed to be proprietary business information, 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 contains a specific exemption relating to "proprietary business information" held by the OIR, but it relates only to such information provided by a title insurance agency or insurer.¹⁹

CS/SB 836: Insurer Solvency

The NAIC 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 currently included in the Insurance Code, and which must be implemented in order for the OIR to maintain its accreditation this fall. Therefore, among other NAIC model act components, CS/SB 836 implements the following NAIC confidentiality requirements:

- *NAIC Property and Casualty Actuarial Opinion Model Law*
Current law requires insurers (except those providing life insurance and title insurance) to provide to the 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.²⁰ The NAIC model law provides that states must require insurers to provide actuarial opinion summaries and that the regulators must keep these summaries confidential.
- *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."²¹ In adopting the NAIC model act, CS/SB 836 requires persons seeking a controlling interest in an insurer or controlling company to file an annual enterprise risk report to the OIR.

¹⁹ Section 626.94195, F.S.

²⁰ Section 624.424, F.S.

²¹ 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.

CS/SB 836 also makes the following changes that are relevant to the public records exemption created by this bill:

- Provides that a controlling person of a domestic insurer may divest its controlling interest by providing notice to the OIR.
- Provides for the OIR's participation in a supervisory college, as the NAIC has also made establishment and participation in supervisory colleges an accreditation standard.

III. Effect of Proposed Changes:

This bill, which is linked to CS/SB 836, creates a public records exemption to incorporate the necessary confidentiality elements for the OIR to meet the NAIC's accreditation standards.

The bill provides that proprietary business information held by the OIR in accordance with its statutory duties relating to insurer solvency is confidential and exempt from public records requirements. It 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 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 the Uniform Trade Secrets Act²² that comply with the Insurance Code's trade secret document marking requirements.
 - 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, material, and other information related thereto.

²² Section 688.002(4), F.S., defines "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.

- A notice filed with the OIR by the person or affiliated person who seeks to divest controlling stock in an insurer.
- The insurers' annual registration statement that is required by CS/SB 836 and all documents, materials, and other information related thereto.
- The enterprise risk report required by CS/SB 836 and the documents, materials, and other information related to the enterprise risk report.
- Information provided to or obtained by the OIR pursuant to participation in a supervisory college.
- Information received from another governmental entity or the NAIC which is confidential or exempt if held by that entity for use by the OIR in the performance of its official duties.

The bill authorizes the OIR to 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 the 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 provides that the public records exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2018, unless reviewed and reenacted by the Legislature. The bill also provides a statement of public necessity as required by the Florida Constitution

The bill will take effect October 1, 2013, if CS/SB 836 or similar legislation is adopted in the same legislative session or an extension thereof and becomes a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. This bill does not appear to affect county or municipal governments.

B. Public Records/Open Meetings Issues:

Vote Requirement

Section 24(c), Art. I of the Florida Constitution requires a newly created public records exemption to pass by a two-thirds vote of the members present and voting in each house of the Legislature. This bill creates a new public records exemption; therefore, it requires a two-thirds vote for final passage.

Public Necessity Statement

Section 24(c), Art. I of the Florida Constitution requires a law creating a new public records exemption to contain a public necessity statement justifying the exemption. This bill creates a new public records exemption; therefore, it contains a public necessity statement.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

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

C. Government Sector Impact:

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

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the CS.)

CS by Banking and Insurance on April 3, 2013:

The CS:

- Clarifies that the public records exemption is applicable to a trade secret as defined in the Uniform Trade Secrets Act and specifies additional types of information that constitute proprietary business information;
- Removes an outdated reference to the Open Government Sunset Review Act of 1995 and replaces it with the Open Government Sunset Review Act; and
- Links the effective date of the CS to the passage of CS/SB 836.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the CS's introducer or the Florida Senate.
