

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 1165 Pub. Rec./Office of Insurance Regulation

**SPONSOR(S):** State Affairs Committee; Insurance & Banking Subcommittee; Hager

**TIED BILLS:** CS/HB 1163 **IDEN./SIM. BILLS:** SB 1416

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	12 Y, 0 N, As CS	Bauer	Luczynski
2) State Affairs Committee	15 Y, 0 N, As CS	Williamson	Camechis
3) Regulatory Affairs Committee			

### SUMMARY ANALYSIS

The National Association of Insurance Commissioners has adopted two new insurance model acts that give state insurance regulators like the Office of Insurance Regulation (OIR) new solvency regulatory tools – the Own Risk and Solvency Assessment (ORSA) and the Corporate Governance Annual Disclosure (CGAD). CS/HB 1163 implements the new ORSA and CGAD requirements in the Insurance Code.

This bill, which is linked to the passage of CS/HB 1163, amends s. 624.4212, F.S., to provide that the following information held by the OIR is confidential and exempt from public records requirements:

- An ORSA summary report or a substantially similar ORSA report;
- A CGAD; and
- Supporting documents.

The exemption does not apply to information obtained by the OIR that would otherwise be subject to public inspection.

The bill provides for repeal of the exemption on October 2, 2021, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

The bill provides an effective date that is contingent upon the passage of CS/HB 1163 or similar legislation enacted in the same legislative session or an extension thereof.

**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 or expanded public record or public meeting exemption. The bill expands the OIR public records exemption to include certain insurer regulatory reports and supporting documents held by the OIR; thus, it requires a two-thirds vote for final passage.**

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Public Records

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 the legislative, executive, or judicial branches of government.<sup>1</sup> The Legislature, however, may provide by general law for the exemption of records from the constitutional requirements.<sup>2</sup> An exemption must state with specificity the public necessity justifying the exemption and may be no broader than necessary to accomplish the stated purpose of the law.<sup>3</sup> A bill enacting an exemption must pass by a two-thirds vote of the members present and voting.<sup>4</sup>

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, 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.<sup>5</sup> A public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a government program, which administration would be significantly impaired without the exemption;
- Protects personal identifying information that, if released, would be defamatory or would jeopardize an individual's safety; or
- Protects trade or business secrets.<sup>6</sup>

The Act requires the automatic repeal of an exemption on October 2 of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>7</sup>

##### National Association of Insurance Commissioners Accreditation

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 a state insurance department is fulfilling legal, regulatory, and organizational oversight standards and practices. Once accredited, a member state is subject to a full accreditation review every five years. 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.

##### Confidential & Exempt Treatment of Insurer Regulatory Reports

In 2014, the Legislature enacted s. 624.4212, F.S., which makes "proprietary business information" contained in certain insurer regulatory documents held by the OIR confidential and exempt<sup>8</sup> from s.

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<sup>1</sup> FLA. CONST., art. I, s. 24(a).

<sup>2</sup> FLA. CONST., art. I, s. 24(c).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> s. 119.15, F.S.

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

<sup>7</sup> s. 119.15(3), F.S.

<sup>8</sup> There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates as *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, the record

119.07(1), F. S., and s. 24(a), Art. I of the State Constitution.<sup>9</sup> Such documents include the principle-based valuation report, the enterprise risk report, and the insurance holding company registration, which are required to be filed with the OIR as part of related legislation enacted in 2014.<sup>10</sup> In some instances, OIR may disclose this confidential and exempt proprietary business information, such as to other state, federal, and international agencies and law enforcement agencies.

“Proprietary business information” means 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:
  - Trade secrets as defined in s. 688.002, F.S.,<sup>11</sup> and that comply with s. 624.4213, F.S.<sup>12</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.<sup>13</sup>

### **CS/HB 1163 (2016): Insurer Regulatory Reporting**

The NAIC has adopted two new insurance model acts that give state insurance regulators like the OIR new solvency regulatory tools – the Own Risk and Solvency Assessment (ORSA) and the Corporate Governance Annual Disclosure (CGAD). Effective January 1, 2018, ORSA is a NAIC accreditation standard. Both model acts require that states must keep these documents confidential.

CS/HB 1163, implements the new ORSA and CGAD requirements in the Insurance Code.

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may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See* 85-62 Fla. Op. Att’y Gen. (1985).

<sup>9</sup> Ch. 2014-100, Laws of Fla. This public records bill was enacted along with the 2014 OIR insurer solvency bill, ch. 2014-101, Laws of Fla. Passage of several components in these bills was necessary for the OIR to maintain its NAIC accreditation.

<sup>10</sup> Ch. 2014-101, Laws of Fla.

<sup>11</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>12</sup> Section 624.4213, F.S., contains a process for submitting trade secret documents to the OIR or the Department of Financial Services, including marking each document as a trade secret.

<sup>13</sup> s. 624.4212(1), F.S.

## Effect of the Bill

The bill amends s. 624.4212, F.S., to provide that ORSA summary reports, substantially similar ORSA reports, CGAD reports, and supporting documents held by the OIR pursuant to a new s. 628.8015, F.S. (created by CS/HB 1163), are confidential and exempt from public records requirements. The bill also makes conforming changes to the exemption, and provides that the exemption does not apply to information obtained by the OIR that would otherwise be available for public inspection.

Unlike the other insurer regulatory reports protected by this statute, the bill makes confidential and exempt the ORSA and CGAD documents in their entirety, not just portions of those reports that contain “proprietary business information.”

The bill provides a statement of public necessity and provides for repeal of the exemption on October 2, 2021, unless reviewed and saved from repeal by the Legislature.

### B. SECTION DIRECTORY:

**Section 1.** Amends s. 624.4212, F.S., relating to confidentiality of proprietary business and other information.

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

**Section 3.** Provides that the bill takes effect on the same date that HB 1163 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

The bill likely could create a minimal fiscal impact on OIR, because staff responsible for complying with public records requests could require training related to creation of the new public records exemption. The OIR noted the bill is expected to have an insignificant impact on OIR technology systems.<sup>14</sup>

### 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’ ORSA summary reports, CGAD reports, and supporting documents, which contain highly sensitive and strategic financial information.

### D. FISCAL COMMENTS:

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<sup>14</sup> Office of Insurance Regulation, Agency Analysis of 2016 House Bill 1165, on p. 6 (Jan. 22, 2016).

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

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

##### 2. Other:

###### Vote Requirement

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 or expanded public record or public meeting exemption. The bill expands the current public records exemption for the OIR; thus, it requires a two-thirds vote for final passage.

###### Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill expands the current public records exemption; thus, it includes a public necessity statement.

###### Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill expands the current public records exemption to include the ORSA summary report, a CGAD, and supporting documents, and excludes information obtained by the OIR that is otherwise available for public inspection.

#### B. RULE-MAKING AUTHORITY:

None provided by the bill.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 25, 2016, the Insurance & Banking Subcommittee considered and adopted one amendment and reported the bill favorably as a committee substitute. The amendment clarified that the exemption does not apply to information obtained by the OIR that would otherwise be available for public inspection.

On February 4, 2016, the State Affairs Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment conformed the public necessity statement to the public record exemption.

This analysis is drafted to the committee substitute as passed by the State Affairs Committee.