

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 Banking and Insurance

BILL: SB 1416

INTRODUCER: Senator Simmons

SUBJECT: Public Records/Own-risk and Solvency Assessment/Corporate Governance Annual Disclosure

DATE: January 25, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	Pre-meeting
2.			GO	
3.			RC	

I. Summary:

SB 1416, which is linked to SB 1422, a bill relating to insurer regulatory reporting, creates a public records exemption to incorporate the confidentiality provisions for the Office of Insurance Regulation (OIR) to meet the National Association of Insurance Commissioners' (NAIC) accreditation standards relating to two model acts. The NAIC has adopted two new insurance model acts that provide state insurance regulators new solvency regulatory tools – the Own Risk and Solvency Assessment (ORSA) and the Corporate Governance Annual Disclosure. Effective January 1, 2018, ORSA is a NAIC accreditation standard. Both model acts require that states must keep these documents confidential. The related bill, SB 1422, implements the requirements of the model acts in the Insurance Code.

Generally, the ORSA requires certain insurers to conduct an ORSA and submit an ORSA summary report to the OIR. The Corporate Governance Annual Disclosure (Corporate Governance) Model Act and corresponding Corporate Governance Annual Disclosure Model Regulations, require insurers to disclose their corporate governance structure, procedures, and practices to the OIR on an annual basis.

The bill provides that the following information held by the OIR is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution:

- An ORSA summary report, a substantially similar ORSA report, and supporting documents submitted pursuant to s. 628.8015, F.S.
- A corporate governance annual disclosure and supporting documents submitted pursuant to s. 628.8015, F.S.

The bill states that it is a public necessity to protect such information because it contain sensitive and strategic financial information and internal practices about an insurer or insurer group.

The effective date of the bill is the same date that SB 1422 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law. The bill provides for repeal of the exemption on October 2, 2021, unless reviewed and saved from repeal by the Legislature pursuant to the Open Government Sunset Review Act.

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

II. Present Situation:

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ This applies to the official business of any public body, officer or employee of the state, including all three branches of state government, local governmental entities and any person acting on behalf of the government.²

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act. The Public Records Act states that

It is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁴

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁵ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”⁶ A violation of the Public Records Act may result in civil or criminal liability.⁷

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(a).

³ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

⁴ Section 119.01(1), F.S.

⁵ Section 119.011(12), F.S., defines “public record” 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.”

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

The Legislature may create an exemption to public records requirements.⁸ An exemption must pass by a two-thirds vote of the House and the Senate.⁹ In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.¹⁰ A statutory exemption that does not meet these criteria may be unconstitutional and may not be judicially saved.¹¹

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹² Records designated as ‘confidential and exempt’ may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as ‘exempt’ may be released at the discretion of the records custodian.¹³

Regulation of Insurance

States primarily regulate insurers. The state of domicile serves as the primary regulator for insurers. Solvency regulation is designed to protect policyholders against the risk that insurers will not be able to meet their financial responsibilities. In Florida, the OIR¹⁴ is primarily responsible for monitoring the solvency of regulated insurers and examining insurers to determine compliance with applicable laws, and taking administrative action, if necessary.

The OIR is a member of the 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. The NAIC accreditation is a certification that a state regulator is complying with legal, regulatory, and organizational oversight standards. Once accredited, a member state is subject to a full accreditation review every 5 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.

Currently, Florida’s Insurance Code makes “proprietary business information”¹⁵ contained in the certain documents confidential and exempt from s. 119.07(1), F.S., and section 24(a), Art. I, of

⁸ FLA. CONST., art. I, s. 24(c).

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So.2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So.2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

¹² If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).

¹³ A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991).

¹⁴ Section 20.121(3)(a), F.S. (2015).

¹⁵ “Proprietary business information” is defined in s. 624.4212, F.S., to mean information, regardless of form or characteristics, which is owned or controlled by an insurer, or a person or affiliated person who seeks acquisition of controlling stock in a domestic insurer or controlling is intended to be treated as private in that disclosure could harm the insurer and the information has not been disclosed except pursuant to a statutory requirement, court order or a private agreement that provides that the information will not be released to the public, and the information is not otherwise readily ascertainable or publicly available by proper means by other persons from another source.

the State Constitution. Actuarial opinion summary included with an insurer's annual financial statement,¹⁶ actuarial opinion of life insurance reserves,¹⁷ divestiture notice filed with the OIR,¹⁸ holding company registration statement,¹⁹ and enterprise risk report²⁰ are examples of these documents. Proprietary business information includes trade secrets, information related to competitive interests, consideration used in carrying out a merger or acquisition, information related to bids or contractual data, and internal auditing controls and internal auditor reports.²¹

Under current law, the OIR may disclose this confidential and exempt information with the written consent of the insurer, pursuant to a court order, at the request of the American Academy of Actuaries for the purpose of disciplinary proceedings, and to other governmental entities and the NAIC upon written agreement to maintain the confidential and exempt status of the information, and for the purpose of aggregating data on an industry-wide basis.²²

The NAIC has adopted two new insurance model acts that provide state insurance regulators 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. The related bill, SB 1422, implements the requirements of the model acts in the Insurance Code.

III. Effect of Proposed Changes:

The bill amends s. 624.4212, F.S., to provide that ORSA summary reports, substantially similar ORSA reports, Corporate Governance reports, and supporting documents submitted pursuant to s. 628.8015, F.S. (created by the linked bill, SB 1422), are confidential and exempt from public records disclosure.

Section 1 provides that the following information held by the OIR is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution:

- An ORSA summary report, a substantially similar ORSA report, and supporting documents submitted pursuant to s. 628.8015, F.S.
- A corporate governance annual disclosure and supporting documents submitted pursuant to s. 628.8015, F.S.

The bill replaces a reference to the “American Academy of Actuaries” with the “Actuarial Board for Counseling and Discipline” for purposes of allowing the OIR sharing of confidential and exempt information for disciplinary proceedings.

¹⁶ Section 624.424(1)(b), F.S.

¹⁷ Sections 625.121(3) and 625.1212(5)(c), F.S.

¹⁸ Section 628.461, F.S.

¹⁹ Section 628.801(1), F.S.

²⁰ Section 628.801(2), F.S.

²¹ Section 624.4212(1)(c), F.S.

²² Section 624.4212(4), F.S.

Unlike the other insurer regulatory reports protected by this s. 624.4212, F.S., the bill exempts the ORSA and the Corporate Governance in their entirety, not just portions of those reports, which contain “proprietary business information.”

Section 2. The bill states that it is a public necessity to protect the ORSA reports and related documents because the information contains sensitive and strategic financial information and internal practices about an insurer or insurer group. Further, the bill states it is a public necessity to protect the Corporate Governance Annual Disclosure and supporting documents of an insurer or insurance group because it could compromise its competitive position by revealing the insurer’s governance structure and internal practices and procedures used to conduct its business affairs, make strategic operational decisions, and manage its financial condition.

Section 3. The effective date of the bill is the same date that SB 1422 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law. The bill provides for repeal of the exemption on October 2, 2021, unless reviewed and saved from repeal by the Legislature pursuant to the Open Government Sunset Review Act.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting in each house of the Legislature for passage of a new or expanded public records or public meetings exemption. Because this bill creates a new public records exemption, it requires a two-thirds vote for passage.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a new or expanded public records or public meetings exemption. The public necessity statement provides support for the exemption.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The public records exemption would protect sensitive and strategic financial information and internal practices about an insurer or insurer group that is reported to the OIR. The existence of the public records exemption may encourage greater comprehensive disclosure to the OIR.

C. Government Sector Impact:

The legislation would encourage cooperation among state regulatory agencies in an effort to eliminate regulatory redundancies and increase efficiencies. Other states that share regulatory filings with Florida would need to confirm that Florida is able to keep these shared filings confidential. A lack of the OIR's ability to do so would compromise the OIR's ability to coordinate with other states, and could potentially increase the regulatory filings.

VI. Technical Deficiencies:

None.

VII. Related Issues:

As an alternative to filing the Corporate Governance Annual Disclosure, (Corporate Disclosure) lines 247-254 of the linked bill (SB 1422) allow an insurer or insurance group to cross-reference "other existing relevant and applicable documents, including, but not limited to, the ORSA summary report, Holding Company B or F filings, Securities and Exchange Commission (SEC) proxy statements, or foreign regulatory reporting requirements, if the documents contain information substantially similar to the information [required to be in the Corporate Disclosure]." While some of these substantially similar Corporate Disclosure substitutes may be independently protected from public records disclosure, (such as the ORSA summary report and Holding Company filings), other documents, such as SEC annual proxy statements, are publicly available.²³ However, a SEC proxy statement submitted in lieu of or in addition to a Corporate Disclosure is arguably considered a "supporting document" that the bill would protect in its entirety.

In order to ensure that the exemption is no broader than necessary to accomplish the stated purpose of the law, the exemption may need to be narrowed to specify that supporting documents are protected, *if not otherwise readily ascertainable or publicly available by proper means by other persons from another source in the same configuration as requested by the OIR*. This same language appears in the definition of "proprietary business information" in s. 624.4212(1)(b), F.S., so other insurer regulatory reports that contain proprietary business information are subject to this same limitation, if portions are already publicly available.

²³ Publicly traded companies' annual proxy statements are available on the Securities & Exchange Commission's EDGAR database. See U.S. SECURITIES AND EXCHANGE COMMISSION, *EDGAR Company Filings*, at <http://www.sec.gov/edgar/searchedgar/companysearch.html> (last visited Jan. 20, 2016).

VIII. Statutes Affected:

This bill substantially amends section 624.4212 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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