

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1009 Pub. Rec./DFS/Insurance Fraud Information

**SPONSOR(S):** Insurance & Banking Subcommittee; Raschein

**TIED BILLS:** CS/CS/CS/HB 1007 **IDEN./SIM. BILLS:** CS/SB 1014

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	12 Y, 0 N, As CS	Peterson	Luczynski
2) Government Accountability Committee	23 Y, 0 N	Whittaker	Williamson
3) Commerce Committee	25 Y, 0 N	Peterson	Hamon

### SUMMARY ANALYSIS

The bill creates a public record exemption that makes the following information, when submitted to the Division of Forensic Services (DIFS) within the Department of Financial Services, exempt from s. 119.07(1), F.S., and s. 24(a), Art I of the Florida Constitution:

- The description of an insurer's anti-fraud education and training;
- The description of an insurer's anti-fraud investigative unit;
- An insurer's rationale for the level of staffing and resources for the anti-fraud investigative unit;
- The number of claims referred to the anti-fraud investigative unit;
- The number of other insurance fraud matters referred to the anti-fraud investigative unit that were not claim related;
- The number of claims accepted or investigated by the anti-fraud investigative unit;
- The number of other insurance fraud matters investigated or accepted by the anti-fraud investigative unit that were not claim related; and
- The estimated dollar amount or range of damages on cases referred to the DIFS or other agencies.

The exemption applies to records held before, on, or after the effective date of the exemption.

The bill provides for repeal of the exemption on October 2, 2022, unless reviewed and saved from repeal by the Legislature. In addition, the bill provides a statement of public necessity as required by the State Constitution. The public necessity statement cites the potential misuse of the information to commit insurance fraud and the potential for business injury if fraud data is accessed by competitors.

The bill provides an effective date on the same date that CS/HB 1007 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

**Article I, section 24(c) of the Florida Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created public record exemption. The bill creates a public record exemption; 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 by general law exempt 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>

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 record or open meeting 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>

##### **Division of Investigative and Forensic Services**

The Division of Investigative and Forensic Services (DIFS) within the Department of Financial Services (Department) encompasses all law enforcement and forensic components residing within the Department. The DIFS investigates a wide range of fraudulent and criminal acts including:

- Insurance Fraud
- Workers' Compensation Fraud
- Fire, Arson, and Explosives Investigations
- Theft/Misuse of State Funds
- Fire and Explosives Sample Analysis

##### **Insurer Anti-Fraud Investigative Units and Plans**

Florida law requires every insurer admitted to do business in this state to have some form of fraud prevention program in place.<sup>8</sup> Insurers with direct written premiums of at least \$10 million in the prior

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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> s. 626.9891(1) - (4), F.S.

year must establish and maintain “a unit or division”<sup>9</sup> to investigate fraudulent claims, typically referred to as a special investigative unit (SIU), or contract for SIU services. These insurers are required to file a detailed description of their SIU or the contract for services, whichever is applicable, with the DIFS. Insurers with direct written premiums of less than \$10 million in the prior year must adopt an anti-fraud plan, or comply with the requirements applicable to larger insurers. An anti-fraud plan must be filed with the DIFS and must include:

- A description of the insurer’s procedures for detecting and investigating possible fraudulent insurance acts;
- A description of the insurer’s procedures for the mandatory reporting of possible fraudulent insurance acts to the DIFS;
- A description of the insurer’s plan for anti-fraud education and training of its claims adjusters or other personnel; and
- A written description or chart outlining the organizational arrangement of the insurer’s anti-fraud personnel who are responsible for the investigation and reporting of possible fraudulent insurance acts.

An insurer that writes workers’ compensation coverage is subject to additional requirements.<sup>10</sup> A workers’ compensation insurer is required to submit a report to the DIFS by August 1 of each year on its experience in implementing and maintaining an anti-fraud investigative unit or an anti-fraud plan. The report must include:

- The dollar amount of recoveries and losses attributable to workers’ compensation fraud delineated by the type of fraud: claimant, employer, provider, agent, or other.
- The number of referrals to the Bureau of Workers’ Compensation Fraud for the prior year.
- A description of the organization of the anti-fraud investigative unit, if applicable, including the position titles and descriptions of staffing.
- The rationale for the level of staffing and resources being provided for the anti-fraud investigative unit, which may include objective criteria such as number of policies written, number of claims received on an annual basis, volume of suspected fraudulent claims currently being detected, other factors, and an assessment of optimal caseload that can be handled by an investigator on an annual basis.
- The in-service education and training provided to underwriting and claims personnel to assist in identifying and evaluating instances of suspected fraudulent activity in underwriting or claims activities.
- A description of a public awareness program focused on the costs and frequency of insurance fraud and methods by which the public can prevent it.

None of the information required to be reported today is protected by a public record exemption.

CS/CS/CS/HB 1007, which is tied to this bill, establishes uniform fraud prevention standards for all insurers, regardless of size. In effect, the bill imposes two new requirements: large insurers will be required to adopt an anti-fraud plan and smaller insurers will be required both to adopt an anti-fraud plan and to establish and maintain an SIU, or contract for SIU services. The tied bill expands the requirements for an anti-fraud plan to include two requirements, with some modifications, that apply only to workers’ compensation insurers today: the rationale for staffing levels and a description of the anti-fraud education and training. In addition, the tied bill revises the requirements for those portions of the anti-fraud plan that are specific to a workers’ compensation insurer by adding a requirement to report, by fraud type, the number of cases referred to the DIFS.

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<sup>9</sup> A “unit or division” may include assigning fraud investigation to employees whose principal responsibilities are the investigation and disposition of claims. s. 626.9891(5), F.S.

<sup>10</sup> s. 626.9891(6), F.S.

Finally, the tied bill creates a new requirement for all insurers to report fraud-related data for each line of insurance written in the prior calendar year. The data must be submitted by March 1, 2019, and annually thereafter, and include:

- The number of policies in effect;
- The amount of premiums written for policies;
- The number of claims received;
- The number of claims referred to the anti-fraud investigative unit;
- The number of other insurance fraud matters referred to the anti-fraud investigative unit that were not claim related;
- The number of claims investigated or accepted by the anti-fraud investigative unit;
- The number of other insurance fraud matters investigated or accepted by the anti-fraud investigative unit that were not claim related;
- The number of cases referred to the DIFS;
- The number of cases referred to other law enforcement agencies;
- The number of cases referred to other entities; and
- The estimated dollar amount or range of damages on cases referred to the DIFS or other agencies.

#### Effect of the Bill on Insurer Anti-Fraud Investigative Units and Plans

The bill creates a public record exemption that makes the following information, when submitted to the Department, exempt<sup>11</sup> from s. 119.07(1), F.S., and s. 24(a), Art I of the Florida Constitution:

- The description of an insurer's anti-fraud education and training;
- The description of an insurer's anti-fraud investigative unit;
- An insurer's rationale for the level of staffing and resources for the anti-fraud investigative unit;
- The number of claims referred to the anti-fraud investigative unit;
- The number of other insurance fraud matters referred to the anti-fraud investigative unit that were not claim related;
- The number of claims accepted or investigated by the anti-fraud investigative unit;
- The number of other insurance fraud matters investigated or accepted by the anti-fraud investigative unit that were not claim related; and
- The estimated dollar amount or range of damages on cases referred to the DIFS or other agencies.

The exemption applies to records held before, on, or after the effective date of the exemption.

The bill provides a statement of public necessity and provides for repeal of the exemption on October 2, 2022, unless reviewed and saved from repeal by the Legislature. The public necessity statement cites the potential for misuse of the information to commit insurance fraud and the potential for business injury if fraud data is accessed by competitors.

#### B. SECTION DIRECTORY:

**Section 1:** Amends s. 626.9891, F.S., relating to insurer anti-fraud investigative units; reporting requirements; penalties for noncompliance.

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<sup>11</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 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).

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

**Section 3:** Provides an effective date on the same date that CS/HB 1007 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have a minimal fiscal impact on the Department for training that may be provided to employees who are responsible for complying with public record requests. In addition, the Department could incur costs for labor associated with redacting the exempt information prior to releasing a record. However, these costs should be absorbed as part of the day-to-day responsibilities of the agency.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

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 Florida 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 creates a public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

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

Breadth of Exemption

Article I, s. 24(c) of the Florida 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 provides that protecting specified anti-fraud information ensures that the Department will have adequate procedures in place to ensure that insurers can properly detect, investigate, and report potential insurance fraud and track and assess trends in insurance fraud while still preventing potential criminal misconduct, including insurance fraud.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 27, 2017, the Insurance & Banking Subcommittee considered and adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment narrowed the scope of the exemption, applied it retroactively to records already in the possession of the Department, and revised the statement of public necessity accordingly.

This analysis is drafted to the committee substitute as passed by the Insurance & Banking Subcommittee.