

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: SB 7012

INTRODUCER: Banking and Insurance Committee

SUBJECT: OGSR/Citizens Property Insurance Corporation Policyholder Eligibility Clearinghouse

DATE: January 29, 2018 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Matiyow</u>	<u>Knudson</u>		BI Submitted as Committee Bill
1.	<u>Brown</u>	<u>Caldwell</u>	<u>GO</u>	Pre-meeting
2.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 7012 provides an Open Government Sunset Review of a public records exemption that makes confidential and exempt proprietary business information provided by participating insurers to the Citizens Property Insurance Corporation’s clearinghouse program (clearinghouse). The proprietary business information is shared with the clearinghouse to facilitate placing risks with participating private market insurers instead of Citizens when applicants or current Citizens policyholders seek new or renewal property insurance coverage from Citizens. Participating insurers use their own proprietary business information in the identification and selection of risks within the program before an offer of coverage is made.

The original public necessity statement upon which the public records exemption is based provides as justification for the exemption that public disclosure of the detailed data required for the program from participating insurers could result in a substantial chilling effect on insurer participation and, ultimately undermine the success of the program.

Justification for the public records exemption remains valid. Therefore, the bill deletes the repeal of the public records exemption.

The bill requires passage by a simple majority vote of each chamber.

The bill takes effect October 1, 2018.

II. Present Situation:

Public Records Law

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.⁴ 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.⁵

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.⁶ 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.”⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

The Legislature may create an exemption to open meetings requirements by passing a general law by a two-thirds vote of the House of Representatives and the Senate.⁹ The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the exemption.¹⁰ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.¹¹

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 Legislature are primarily located in s. 11.0431(2)-(3), F.S.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ 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” 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.”

⁷ *Shevin v. Byron, Harless, Schaffer, Reid, and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

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

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 under certain circumstances.¹³

Open Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the OGSR) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁴ The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹⁵ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

The OGSR 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.¹⁶ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;¹⁷
- Releasing sensitive personal information would be defamatory or would jeopardize an individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;¹⁸ or
- It protects trade or business secrets.¹⁹

The OGSR also requires specified questions to be considered during the review process.²⁰ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

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 683 (Fla. 5th DCA 1991).

¹⁴ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S.

¹⁵ Section 119.15(3), F.S.

¹⁶ Section 119.15(6)(b), F.S.

¹⁷ Section 119.15(6)(b)1., F.S.

¹⁸ Section 119.15(6)(b)2., F.S.

¹⁹ Section 119.15(6)(b)3., F.S.

²⁰ Section 119.15(6)(a), F.S. The specified questions are:

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²¹ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.²²

Citizens Property Insurance Corporation Policyholder Eligibility Clearinghouse Program (clearinghouse)

The Legislature established the Citizens Property Insurance Corporation policyholder eligibility clearinghouse program (clearinghouse) in 2013.²³ The program identifies private-market property insurance options for homeowners who believe Citizens may be their only choice for property insurance. When an applicant applies for coverage with Citizens, the Citizens agent enters information from the application into the clearinghouse. Participating private-market companies review the information in determining whether to offer coverage. If so, the agent provides the applicant with a quote sheet that includes a side-by-side list of offers received. The quote sheet indicates which offers are comparable to Citizens and whether any of the offers falls within the threshold of no more than 15 percent greater than Citizens current rate for new policies and 0 percent of Citizens current rate for renewal policies. If an offer from a participating private market insurer falls within these thresholds, the applicant is ineligible for coverage with Citizens.²⁴ Renewal applicants made ineligible for coverage due to a private market offer through the clearinghouse can reapply and be rated as a renewal if, within the first 3 years of leaving Citizens, their private market rate increased by greater than 10 percent in one year.²⁵

To date, a total of 15 private market insurers participate in the clearinghouse.²⁶ Since its launch in 2014, thru December 12, 2017, a total of 45,835 new policies and \$13.56 billion in Coverage A has been channeled away from Citizens.²⁷ Additionally, during this same time frame, 8,880

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- What specific records or meetings are affected by the exemption?
 - Whom does the exemption uniquely affect, as opposed to the general public?
 - What is the identifiable public purpose or goal of the exemption?
 - Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
 - Is the record or meeting protected by another exemption?
 - Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

²¹ FLA. CONST. art. I, s. 24(c).

²² Section 119.15(7), F.S.

²³ Chapter 2013-60, L.O.F.

²⁴ Sections 627.3518(5), and 627.351(6)(n)6., F.S.

²⁵ *Id.*

²⁶ Citizens Property Insurance Corporation, *Clearinghouse*, available at: <https://www.citizensfla.com/clearinghouse> (Last visited Jan. 25, 2018).

²⁷ Citizens Property Insurance Corporation, *Citizens Market Accountability and Advisory Committee Depopulation and Clearinghouse Update*, Dec. 12, 2017, available at: <https://www.citizensfla.com/documents/20702/6045232/20171212+05+Depopulation+and+Clearinghouse+Update.pdf/4f2151bc-a9fb-4bc6-874a-4c01072b58be> (Last visited Jan. 25, 2018).

renewal policies consisting of \$1.55 billion in Coverage A has also been channeled out of Citizens and into the private market.²⁸

Public Records Exemption for Proprietary Business Information

In addition to establishing the clearinghouse, the 2013 Legislature provided a public records exemption for proprietary business information submitted to the clearinghouse.²⁹ Specifically, the exemption made confidential and exempt proprietary business information provided to the clearinghouse by insurers, which is used to identify and select risks for an offer of coverage.

Proprietary business information, for purposes of the public records exemption, is information, regardless of form or characteristics, owned or controlled by an insurer which:

- Is identified by the insurer as proprietary business information and is intended to be and is treated by the insurer as private in that the disclosure of the information would cause harm to the insurer, an individual, 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 provided to the clearinghouse; and
- Includes, but is not limited to:
 - Trade secrets.
 - Information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information.

Proprietary business information may be found in underwriting criteria or instructions which are used to identify and select risks for an offer of coverage through the program and are shared with the clearinghouse to facilitate the shopping of risks by participating insurers.³⁰

The clearinghouse may, however, disclose confidential and exempt proprietary business information:

- If the insurer to which it pertains gives prior written consent;
- If required by a court order; or
- If given to another state agency in this or another state or a federal agency provided the recipient agrees in writing to maintain the confidential and exempt status of the information.

As justification for the public records exemption, the public necessity statement provides, in part:

Obtaining offers of coverage from authorized insurers through the clearinghouse will provide more choices for consumers and reduce the corporation's exposure and potential for imposing assessments on its policyholders and policyholders in the private market. In order for the program to efficiently determine whether there are authorized insurers interested in making an offer of coverage for a particular risk, a substantial amount of detailed data from participating insurers must be

²⁸ *Id.*

²⁹ Chapter 2013-61, L.O.F.; Section 627.3518(11), F.S. Chapter 2013-61, L.O.F., originally placed the public records exemption in subsection (10) of s. 627.3518, F.S., but it has subsequently been renumbered.

³⁰ Section 627.3518(11)(a), F.S.

provided Public disclosure of the detailed data could result in a substantial chilling effect on insurer participation in the program and thereby undermine the program's success.³¹

III. Effect of Proposed Changes:

The bill provides an Open Government Sunset Review (OGSR) of a public records exemption that makes confidential and exempt proprietary business information provided by participating insurers to the Citizens clearinghouse program. The proprietary business information is shared with the clearinghouse to facilitate placing risks with participating private market insurers instead of Citizens when applicants or current Citizens policyholders seek new or renewal property insurance coverage from Citizens. Participating insurers use their own proprietary business information in the identification and selection of risks within the program before an offer of coverage is made.

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The bill takes effect October 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill complies with the requirement of article I, section 24 of the State Constitution that a public records exemption created by the Legislature may only contain exemptions from the constitutional public access requirements and shall relate to one subject.

C. Trust Funds Restrictions:

None.

³¹ Chapter 2013-61, L.O.F.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

If the exemption is repealed, insurers may stop participating in the clearinghouse program and Citizens efforts to depopulate could be negatively impacted.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 627.3518 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.