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Committee on Banking and Insurance

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 626.97411, F.S., CREDIT SCORING METHODOLOGIES

SUMMARY

Most auto insurers and property insurers use credit scores and related credit history information as an underwriting tool in determining whether to issue a policy to an applicant, the rates to be charged, or both. Studies have indicated that persons with low credit scores have higher claims experience and, therefore, are worse insurance risks.

In 2003 the Florida Legislature enacted legislation that regulated and limited the use of credit information by insurers (s. 626.9741, F.S.), which effectively requires that insurers file their credit scoring models with the Office of Insurance Regulation as part of a rate filing that uses such models. A separate law (s. 626.97411, F.S.) was also enacted in 2003 that created a public records exemption for credit scoring methodologies that are "trade secrets" as statutorily defined. This public records exemption is scheduled for repeal on October 2, 2008, unless reviewed by the Legislature and saved from repeal pursuant to the Open Government Sunset Review Act.

A general public records exemption for all trade secrets is provided by s. 815.045, F.S., as interpreted by the Florida First District Court of Appeal in *Sepro Corp. v. Fla. Dept. of Environmental Protection* (see fn. 21 below).

The OIR does not have a process to determine whether an insurer's credit scoring data is a trade secret. If a public records request is made for the specific information claimed as trade secret, the Office notifies the company that, unless a judge issues an injunction against the release of the information, the information will be released to the requestor within 10 days.

In some states, the credit scoring data filed by insurers is not protected from public disclosure. In those states, insurer representatives stated that they either use a third-party party model that is publicly available or use

a "less robust" model that has fewer or simpler data points, but which the insurer believes to be less accurate than its proprietary model in matching risk to price.

Committee staff recommends that the current public records exemption be maintained for credit scoring methodologies and related information that are trade secrets as defined in s. 688.002, F.S., and that are filed with the Office of Insurance Regulation. Alternatively, this exemption should be replaced with a general public records exemption for all trade secrets.

If the Legislature intends to enact a general public records exemption for all trade secrets, it should be enacted as a general exemption in the Public Records Law, ch. 119, F.S., rather than relying on the court-interpreted exemption for trade secrets in s. 815.045, F.S.

Committee staff also recommends that the Office of Insurance Regulation determine whether credit scoring information that is the subject of a public records request is, or is not, a trade secret as statutorily defined. The Office's current practice of disclosing requested information identified by the insurer as a trade secret unless the insurer obtains a court injunction is inconsistent with its duty as custodian of public records and confidential information.

BACKGROUND

Public Records

Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892. In 1992, Florida adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.¹ Article I, s. 24 of the State Constitution, provides that:

¹ Article I, s. 24 of the State Constitution.

(a) Every person has 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 persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. . .

The Public Records Act² specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

Unless specifically exempted, all agency³ records are available for public inspection. The term, “public record,” is broadly defined to mean⁴:

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.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.⁵ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁶

Only the Legislature is authorized to create exemptions to open government requirements.⁷ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁸ A bill enacting an exemption⁹ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹⁰

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹¹ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹²

Open Government Sunset Review Act

The Open Government Sunset Review Act¹³ provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the

² Chapter 119, F.S.

³ The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law...”

⁴ Section 119.011(11), F.S.

⁵ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁶ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

⁷ Article I, s. 24(c) of the State Constitution.

⁸ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

⁹ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹⁰ Art. I, s. 24(c) of the State Constitution.

¹¹ Attorney General Opinion 85-62.

¹² *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹³ Section 119.15, F.S.

exemption. An identifiable public purpose is served if the exemption:¹⁴

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.

The act also requires consideration of the following¹⁵:

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

Use of Credit Information by Insurers

Beginning in the 1990's, auto insurers and property insurers have increasingly used credit scores and related credit history information as an underwriting tool in determining whether to issue a policy to an applicant or the rates to be charged. Actuarial studies have indicated that persons with low credit scores have higher claims experience and, therefore, are worse insurance risks. A recent report to Congress by the Federal Trade Commission concludes, "Credit-based

insurance scores are effective predictors of risk under automobile insurance policies. They are predictive of the number of claims consumers file and the total cost of those claims."¹⁶

In response to concerns about this practice and a report from a task force appointed by Chief Financial Officer Tom Gallagher, the Florida Legislature in 2003 enacted legislation that regulated and limited the use of credit information by insurers.¹⁷ This legislation has remained unchanged since that time, while rulemaking has remained tied up in litigation.

The law (s. 626.9741, F.S.) applies to personal lines motor vehicle insurers and personal lines residential property insurers that make an "adverse decision" based on credit information of the policyholder or applicant. An "adverse decision" includes a refusal to issue or renew a policy, issuance of a policy with exclusions or restrictions, increasing the rates or premium, and other specified adverse underwriting results. Highlights of the law include:

- A rate filing that uses credit reports or credit scores must comply with the requirements of the applicable rating law (s. 627.062, F.S., or s. 627.0651, F.S.) to ensure that rates are not excessive, inadequate, or unfairly discriminatory.
- Insurers must notify an applicant or insured that a credit report is being requested for underwriting or rating purposes.
- An insurer may not request a credit report based upon the race, color, religion, marital status, age, gender, income, national origin, or place of residence of the applicant or insured.
- If an insurer makes an adverse decision based upon a credit report, the insurer or designated third party must provide a copy of the credit report to the applicant or insured. The insurer must include the four primary reasons, or fewer if applicable, of the adverse decision.
- The insurer must provide an appeal process for persons whose credit report or credit

¹⁴ Section 119.15(6) (b), F.S.

¹⁵ Section 119.15(6)(a), F.S.

¹⁶ *Credit-Based Insurance Scores: Impacts on Consumers of Automobile Insurance* (July 2007), available at: <http://www.ftc.gov>. The FTC will be issuing a subsequent report on the impact of credit-based insurance scores on homeowners insurance, expected in early 2008.

¹⁷ ch. 2003-207, L.O.F. (Senate Bill 40-A)

score is unduly influenced by the death of a spouse or temporary loss of employment.

- An insurer may not make an adverse decision solely because of credit information.
- An insurer may not make an adverse decision based on: 1) the absence of, or insufficient credit history, in which case the insurer must treat the consumer as otherwise approved by the Department of Financial Services if the insurer presents information that such an absence or inability is related to the risk for the insurer; 2) credit information related to medical bills, if so identified in the credit report; 3) place of residence; or 4) any other special circumstance that the Financial Services Commission determines, by rule, lacks sufficient statistical correlation and actuarial justification as a predictor of insurance risk.
- An insurer must reevaluate the credit history of an insured that was adversely impacted every 2 years or upon the request of the insured, whichever occurs first. Alternatively, an insurer may reevaluate the insured within the first 3 years based on other allowable underwriting or rating factors, excluding credit information, provided that the insurer does not increase the rates or premium charged to the insured based on the exclusion of credit reports or credit scores.
- The Financial Services Commission may adopt rules to administer the provisions of this act, including : 1) information required in filings to demonstrate compliance related to notifying consumers about adverse decisions; 2) statistical information an insurer must retain and report annually to the Office of Insurance Regulation; 3) standards that ensure that the use of credit information does not unfairly discriminate, based upon race, color, religion, marital status, age, gender, income, national origin, or place of residence; and 4) standards for reviewing models and methods to grade or rank credit report data to ensure that the insurer demonstrates that such methods are valid in predicting insurance risk.

A separate bill was also enacted in 2003 creating a public records exemption for credit scoring methodologies that are trade secrets filed by insurers with the Office of Insurance Regulation.¹⁸ By its terms, the main bill would not have taken effect unless the public records bill was enacted as well. This statute provides as follows:

626.97411 Public records exemption for the Office of Insurance Regulation.--Credit scoring methodologies and related data and information that are trade secrets as defined in s. 688.002, F.S., and that are filed with the Office of Insurance Regulation pursuant to a rate filing or other filing required by law are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

The public necessity statement accompanying the above exemption, read as follows:

The Legislature finds that it is a public necessity that credit scoring methodologies and related data and information that are trade secrets, filed with the Office of Insurance Regulation pursuant to a rate filing or other filing required by law, be made confidential and exempt from public-records requirements. Such information could harm the business of an insurance company, as it contains proprietary confidential business information that has economic value derived from not being disclosed to competitors. The Legislature further finds that it is a public necessity to make such information confidential and exempt from public disclosure because release of such information would likely result in an insurer's not providing the Office of Insurance Regulation with adequate information on which to base a determination as to whether a filing meets the requirements of law, resulting in increased administrative and legal disputes with regard to the filing. (s. 3, ch. 2003-408, L.O.F.)

The public records exemption under review is scheduled for repeal on October 2, 2008, unless reviewed by the Legislature and saved from repeal pursuant to the Open Government Sunset Review Act.

¹⁸ Ch. 2003-408, L.O.F. (Committee Substitute for Senate Bill 42-A).

METHODOLOGY

Committee staff reviewed the legislative history of the public records exemption under review and the companion law regulating the use of credit reports by insurers, including subsequent proposed rules and related litigation. Staff also reviewed the relevant case law, reports of the Federal Trade Commission, and interviewed representatives of the Office of Insurance Regulation, insurance companies, and the First Amendment Foundation.

FINDINGS

After the passage of the 2003 law regulating the use of credit information by insurers, the Office of Insurance Regulation (OIR) initiated rulemaking that has been in continuous litigation and has not yet been implemented. Most recently, a public hearing was held on August 9, 2007, on the latest proposed rule, which has again been challenged and has not yet been presented to the Financial Services Commission for final approval. A previous rule was challenged by various insurance groups and found by an administrative law judge to be an invalid exercise of delegated legislative authority.¹⁹

The controversy has primarily related to the authority for the Financial Services Commission to adopt rules that ensure that the use of credit information does not “unfairly discriminate” based upon race, color, religion, marital status, age, gender, income, national origin, or place of residence. The latest proposed rule prohibits a company from using credit scores unless the company can show through empirical data that the use of the score does not “disproportionately impact” any class based upon these factors. Insurers argue that the term “unfair discrimination” as prohibited in the Insurance Code has traditionally meant that a rating factor must be actuarially justified and must reflect the expected risk of loss for that class. OIR argues that since the Insurance Code had already prohibited unfair discrimination, the Legislature intended that the prohibition in the credit scoring statute must mean something different, which is a broader prohibition against having a disproportionate impact on specified classifications. The administrative law judge agreed with OIR on this point, even though he found the rule to be an unlawful delegation of legislative authority, primarily because the rule did not provide sufficient

guidance to insurers regarding what constitutes a disparate impact on the specified classes. The new proposed rule attempts to address these concerns. The issues involved are not directly related to the scope of this public records exemption review, but the rule is likely to affect the information that insurers must file with the Office that would potentially be protected by the public records exemption.

As the proposed rule has remained in flux, insurers have been allowed to use credit scoring as authorized by statute and implemented by OIR. Insurers typically develop an “insurance score” for a consumer based on their credit score and other credit history information. Some insurers contract with a credit scoring organization, typically either Fair, Issac, and Co. or ChoicePoint, to develop the insurance score. In some cases the insurance score is tailored for an insurer based on its own underwriting criteria. Many larger insurers, like State Farm and Allstate, develop their own credit scoring methodologies based on their own loss data and credit history obtained from credit bureaus or credit reporting agencies.

The typical information used in a credit-based insurance scoring model gives the consumer low marks or a “riskier” score if the consumer has a high number of late payments or delinquencies, debt collections (generally, non-medical), legal judgments or bankruptcies, and new credit cards or credit applications. It also leads to a riskier score if the consumer has a high ratio of outstanding balances to available credit and a greater number or usage of credit cards issued by department stores, oil companies, and travel and entertainment businesses. A less riskier score is typically generated by having lower numbers for such factors and also by the greater the age of the oldest credit account and the greater the average age of all accounts. Also, a greater proportion of credit from major banks or for home mortgages (compared to department stores, etc.) usually leads to a less risky score.²⁰

The OIR requires an insurer to file its credit scoring methodology with the Office, based on the statutory requirement that a rate filing that uses credit reports must comply with the requirements of the insurance rating laws. This is the actual “formula” that is used for producing the insurance score. This effectively requires an insurer that does not develop its own model to obtain such information from the third party vendor

¹⁹ Final Order of Dec. 29, 2006, for *Florida Insurance Council, et al. v. Office of Insurance Regulation and Financial Services Commission* (Case No.’s 05-1012RP, 05-2803RP, and 06-2036RU).

²⁰ *Credit-Based Insurance Scores: Impacts on Consumer of Automobile Insurance*, Table 1. (See fn. 15)

that developed the model. The insurer or organization will typically consider such information proprietary and will not allow its release to competitors. However, according to a report by the Financial Trade Commission, at least one vendor (ChoicePoint) has made its insurance credit scoring model available to the public.²¹

The public records exemption is limited to credit scoring methodologies and related data and information that are *trade secrets* as defined in s. 688.002, F.S., which provides as follows:

688.002 Definitions.--

(4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:

(a) 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

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

A general public records exemption for all trade secrets is provided by s. 815.045, F.S., as interpreted by the Florida First District Court of Appeal. In *Seapro Corp. v. Fla. Dept. of Environmental Protection*,²² the court determined that this statute provides a public records exemption for all trade secrets as defined in s. 812.081(1)(c), F.S. The court noted that the statute reads like a statement of legislative intent rather than a conventionally phrased provision of positive law, but that its intended effect is clear. This statute provides as follows:

815.045 Trade secret information.--The Legislature finds that it is a public necessity that trade secret information as defined in s. 812.081, F.S., and as provided for in s. 815.04(3), F.S., be expressly made confidential and exempt from the public records law because it is a felony to disclose such records. Due to the legal uncertainty as to whether a public employee would be protected

from a felony conviction if otherwise complying with chapter 119, and with s. 24(a), Art. I of the State Constitution, it is imperative that a public records exemption be created. The Legislature in making disclosure of trade secrets a crime has clearly established the importance attached to trade secret protection. Disclosing trade secrets in an agency's possession would negatively impact the business interests of those providing an agency such trade secrets by damaging them in the marketplace, and those entities and individuals disclosing such trade secrets would hesitate to cooperate with that agency, which would impair the effective and efficient administration of governmental functions. Thus, the public and private harm in disclosing trade secrets significantly outweighs any public benefit derived from disclosure, and the public's ability to scrutinize and monitor agency action is not diminished by nondisclosure of trade secrets.

The statute quoted above references the definition of "trade secret" in s. 812.081, F.S., which is different than the definition referenced in the statute under review. This definition is somewhat broader, by defining a trade secret as providing a business an "advantage" over those who do not know it, rather than requiring that it derive "economic value" from not being generally known by other persons. The definition cited in the general exemption for trade secrets is as follows:

812.081 Trade Secrets; theft, embezzlement; unlawful copying; definitions; penalty.--

(1) As used in this section:

(c) "Trade secret" means the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. "Trade secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

²¹ Id, p. 13.

²² 911 So.2d 792 (Fla. 1st DCA, 2003); rev. denied sub nom. *Crist v. Fla. Dept. of Environmental Protection*, 911 So.2d 792 (Fla. 2005).

1. Secret;
2. Of value;
3. For use or in use by the business; and
4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it

when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

The OIR reports that it does not have a process to determine whether an insurer's credit scoring data or any other information filed with OIR meets the definition of a "trade secret" even though the Office acknowledges that credit scoring methodologies "appear to fall within the definition of trade secret." Insurance companies submit all documents related to a rate or form filing to the Office through an electronic file transfer program on the Internet. This program allows those documents to be viewed online by the general public via the Office's online "I-File" system. If a company wants to categorize information as a trade secret, it must submit the information under a special link and submit a cover page explaining why it should remain trade secret. That information is not able to be viewed on the Internet by the public.

If a public records request is made for the specific information claimed as trade secret, the Office notifies the company that, unless a judge issues an injunction against the release of the information, the information will be released to the requestor within 10 days. If the company wishes that the information be kept a trade secret and not released, the insurer must file an appropriate action with a court to determine whether the information is a trade secret that is confidential and exempt from public disclosure. The Office stated that public records requests have been made for credit scoring information, resulting in notice to the affected insurance company, but that the parties resolved the matter between themselves which did not require OIR to disclose the information.

The Office of Insurance Regulation has recommended that the exemption under review should be repealed because "the Office believes that this information should be made transparent and accessible to the public." However, the Office acknowledges that this information may still be protected from public records disclosure under the general exemption for trade secrets in s. 815.045, F.S. The Office also

acknowledges that if this exemption is repealed, it is extremely likely that the industry will initiate further litigation against the proposed rule to avoid having to submit this data to the Office.

In some states, the credit scoring data filed by insurers is not protected from public disclosure. In those states, insurer representatives stated that they either use a third-party party model that is publicly available or use a "less robust" model that has fewer or simpler data points, but which the insurer believes to be less accurate than its proprietary model in matching risk to price.

The Open Government Sunset Review Act (s. 119.15(6)(a), F.S.) prescribes the following questions that must be considered by the Legislature in determining whether to reenact a public records exemption:

What specific records or meetings are affected by the exemption?

The statute specifies that credit scoring methodologies and related data and information that are trade secrets as defined in s. 688.002, F.S., and that are filed with the Office of Insurance Regulation pursuant to a rate filing or other filing required by law are confidential.

Whom does the exemption uniquely affect?

The exemption affects auto and property insurance companies that use credit history information in underwriting or rate setting and third party vendors that develop and sell credit scoring models to such insurers.

What is the exemption's public purpose or goal?

The public purpose of the exemption is to protect proprietary trade secret information that has economic value from becoming generally known by other persons who can obtain economic value from its disclosure. This is consistent with the Open Government Sunset Review Act which provides that an identifiable public purpose is served if the exemption protects information of a confidential nature that is used to further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace. An insurer or third party vendor that develops a credit scoring model believes that it has a more accurate method of predicting insurance risk, or one that is more consistent with its general underwriting criteria, to better enable it to match price to risk, which provides a competitive advantage over other insurers or vendors.

Is the information otherwise readily obtainable?

The credit scoring data filed by insurers and third party entities with the OIR is not generally obtainable. However, according to the recent report of the Federal Trade Commission at least one entity (ChoicePoint) has reportedly made its credit scoring model publicly available.

Is the record or meeting protected by another exemption?

Yes, based on current case law. A general public records exemption for all trade secrets is provided by s. 815.045, F.S., as interpreted by the Florida First District Court of Appeal in *Sepero Corp. v. Fla. Dept. of Environmental Protection*, discussed above.

Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

Yes, the Legislature should consider having a single public records exemption for trade secrets as recommended below.

RECOMMENDATIONS

Committee staff recommends that the current public records exemption be maintained for credit scoring methodologies and related information that are trade secrets as defined in s. 688.002, F.S., and that are filed with the Office of Insurance Regulation. Alternatively, this exemption should be replaced with a general public records exemption for all trade secrets, to be enacted in the Public Records Law, ch. 119, F.S.

Committee staff also recommends that the Office of Insurance Regulation determine whether credit scoring information that is the subject of a public records request is, or is not, a trade secret as statutorily defined. Its current practice of disclosing requested information identified by the insurer as a trade secret unless the insurer obtains a court injunction is inconsistent with its duty as custodian of public records and confidential information.

If the Legislature intends to enact a general public records exemption for all trade secrets, it should be enacted as a general exemption in the Public Records Law, ch. 119, F.S., rather than relying on the court-interpreted exemption for trade secrets in s. 815.045, F.S.