



# The Florida Senate

*Interim Project Report 2003-202*

*November 2002*

Committee on Banking and Insurance

Senator James E. "Jim" King, Jr., President

## **OPEN GOVERNMENT SUNSET REVIEW OF THE PUBLIC RECORDS EXEMPTION FOR SPECIFIED RECORDS OF THE FLORIDA AUTOMOBILE JOINT UNDERWRITING ASSOCIATION (SECTION 627.311(3)(L), FLORIDA STATUTES)**

### **SUMMARY**

The public records and public meetings exemptions pertaining to the Florida Automobile Joint Underwriting Association (FAJUA) under s. 627.311(3)(l), F.S., were identified by the Division of Statutory Revision as being subject to review during the interim and, unless the Legislature reenacts these provisions, they will be repealed on October 2, 2003. The specific exemptions apply to records of the FAJUA relating to open claims, underwriting, and audit files, as well as privileged attorney-client communications, proprietary information, certain employee records, on-going negotiations, and portions of meetings relating to open claims and underwriting files.

The FAJUA was created by Order of the Insurance Commissioner in 1973 as an "insurer of last resort" to provide motor vehicle insurance to applicants who are unable to procure such coverage through the voluntary or competitive market due to a variety of factors, including driving history or status as first-time drivers.<sup>1</sup> Every insurer authorized to write automobile liability insurance or automobile physical damage insurance in Florida is required to be a member of the FAJUA. In 1998, the Legislature enacted ch. 98-315, L.O.F., to exempt from disclosure certain records and portions of meetings relating to the FAJUA.

<sup>1</sup> Order dated February 9, 1973, in Case No. 73-RR-03H, by Insurance Commissioner and Treasurer Thomas D. O'Malley. The Order establishing the automobile joint underwriting association replaced the existing Florida Automobile Insurance Facility Plan based upon the recommendations of the Florida Automobile Insurance Facility Reform Committee. Ch. 59-205, L.O.F., mandated that joint underwriting associations be subject to regulation by the Insurance Commissioner and authorized the Commissioner to issue orders relating to the activities of such associations.

Based upon a Committee staff survey of the FAJUA, and the standards set forth in the Open Government Sunset Review Act, it is recommended that the current FAJUA public records and public meetings exemptions be retained, however, the provision pertaining to attorney-client communications should be removed because it is too broad and there is an existing attorney public records exemption which would be applicable to the FAJUA under ch. 119, F.S., (Public Records Law). Furthermore, technical conforming changes are recommended to clarify certain public records and public meetings exemptions, and it is recommended that references pertaining to the Department of Insurance and Insurance Commissioner in s. 627.311(3)(l), F.S., conform to ch. 2002-404, L.O.F., which abolished the Department of Insurance and created the position of Chief Financial Officer.

### **BACKGROUND**

**Constitutional Access to Public Records** - Florida has a long history of providing public access to the records of governmental and other public entities. This tradition began in 1909 with the enactment of a law that guaranteed access to the records of public agencies.<sup>2</sup> Over the following nine decades, a significant body of statutory and judicial law developed that greatly enhanced the original law. The state's Public Records Act, which is contained within ch. 119, F.S., was first enacted in 1967.<sup>3</sup> The act has been amended numerous times since its enactment.

In November 1992, the public affirmed the tradition of government-in-the-sunshine by enacting a constitutional amendment which guaranteed and

<sup>2</sup> Section 1, ch. 5942, 1909; RGS 424; CGL 490.

<sup>3</sup> Chapter 67-125 (1967 L.O.F.)

expanded the practice. Article I, s. 24(a) of the State Constitution states:

(a) Every person has the right to inspect or copy any public records 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. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created there under; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The effect of adopting this amendment was to raise the statutory right of access contained in the Public Records Law to a constitutional level and of extending those provisions beyond the executive branch to the judicial and legislative branches of state government. The amendment “grandfathered” exemptions that were in effect on July 1, 1993, until they are repealed.<sup>4</sup>

The State Constitution, the Public Records Law,<sup>5</sup> and case law specify the conditions under which public access must be provided to governmental records. Under these provisions, public records are open for inspection and copying unless they are made exempt by the Legislature according to the process and standards required in the State Constitution. Section 119.07(1)(a), F.S., requires:

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 or the custodian’s designee. . . .

The Public Records Law states that, unless specifically exempted, all agency<sup>6</sup> records are to be available for

<sup>4</sup> Article 1, s. 24(d) of the State Constitution.

<sup>5</sup> Chapter 119, F.S.

<sup>6</sup> 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 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,

public inspection. The term “public record” is broadly defined 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.<sup>7</sup>

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.<sup>8</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>9</sup>

The Legislature is expressly authorized to create exemptions to public records requirements. Article I, s. 24(c) of the State Constitution, permits the Legislature to provide by general law for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law. Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>10</sup>

Exemptions to public records requirements are strictly construed because the general purpose of open records requirements is to allow Florida’s citizens to discover the actions of their government.<sup>11</sup> The Public Records Act is liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose.<sup>12</sup>

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corporation, or business entity acting on behalf of any public agency.”

<sup>7</sup> Section 119.011(1), F.S.

<sup>8</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>9</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>10</sup> Art. I, s. 24(c) of the State Constitution.

<sup>11</sup> *Christy v. Palm Beach County Sheriff’s Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997).

<sup>12</sup> *Krischer v. D’Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So.2d 1000, 1002 (Fla. 5th DCA 1987), review denied, 520 So.2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So.2d 480, 483 (Fla. 2d DCA 1986), review denied *sub nom.*, *Gillum v. Tribune Company*, 503 So.2d 327 (Fla.

Exemptions to open government requirements are subjected to a review and repeal process 5 years after their initial enactment.<sup>13</sup> An exemption also may be subjected to this automatic review and repeal process if it has been “substantially amended.” An exemption has been substantially amended under the act if it “. . . expands the scope of the exemption to include more records or information or to include meetings as well as records.”<sup>14</sup>

The Open Government Sunset Review Act of 1995<sup>15</sup> establishes a process for identifying those exemptions that are subject to review, as well as provides the standard that an exemption must meet to be recommended for reenactment.

Under the act, by June 1 of each year, the Division of Statutory Revision of the Office of Legislative Services must 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.<sup>16</sup> If the division does not include an exemption on the certified list that should have been included that exemption “. . . is not subject to legislative review and repeal under this section.”<sup>17</sup> If the division later determines that an exemption should have been certified, it “. . . shall include the exemption in the following year’s certification after that determination.”<sup>18</sup>

As part of the review process, the Legislature is to consider:

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 so, how?<sup>19</sup>

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1987).

<sup>13</sup> An exemption that is required by federal law or that applies solely to the Legislature or the State Court System is expressly excluded from the automatic review and repeal process by s. 119.15(3)(d) and (e), F.S.

<sup>14</sup> Section 119.15(3)(b), F.S.

<sup>15</sup> Section 119.15, F.S.

<sup>16</sup> Section 119.15(3)(d), F.S.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Section 119.15(4)(a), F.S.

Under s. 119.15(4)(b), F.S., 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 exemption. The three specified criteria, one of which must be met by the exemption, are if the exemption:

1. allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
2. 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
3. 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.<sup>20</sup>

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemptions, one session of the Legislature cannot bind another.<sup>21</sup> The Legislature is only limited in its review process by constitutional requirements. In other words, if an exemption does not explicitly meet the requirements of the act, but falls within constitutional requirements, the Legislature cannot be bound by the terms of the Open Government Sunset Review Act. Further, s.119.15(4)(e), F.S., makes explicit that:

. . . notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of an exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

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<sup>20</sup> Section 119.15(4)(b), F.S.

<sup>21</sup> *Straghan v. Camp*, 293 So.2d 689, 694 (Fla.)

**Constitutional Access to Public Meetings** - Article I, s. 24(b) of the Florida Constitution expresses Florida's public policy regarding access to public meetings by providing that:

(b) All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, city, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public...

The Constitution does, however, permit the Legislature to provide by general law for the exemption of meetings from the requirements of s. 24(c). However, as noted above for public records, the general law exempting access to public meetings must state with specificity the public necessity justifying the exemption and can be no broader than necessary. Section 286.011, F.S., states the provisions for access to public meetings and further provides that s. 119.15, F.S., outlined above, governs the exemption provisions for access to public meetings.

## METHODOLOGY

Committee staff developed and submitted to the FAJUA a written questionnaire covering the exemptions stated in s. 627.311(3)(l), F.S., reviewed relevant statutory provisions, and surveyed pertinent case law during the review process.

## FINDINGS

**The Operation of the Florida Automobile Joint Underwriting Association** - Current Florida law provides for compulsory purchase of no-fault automobile insurance coverage, referred to as personal injury protection (PIP), which compensates the policyholder directly up to \$10,000 without regard to fault for bodily injury sustained in an motor vehicle accident.<sup>22</sup> Property damage liability coverage of \$10,000 is also required which pays for the physical damage expenses caused by the insured to third parties in the accident.<sup>23</sup>

<sup>22</sup> Sections 627.730-627.7405, F.S. This coverage also provides the policyholder with immunity from liability for economic damages up to the policy limits and for non-economic damages (pain and suffering) for most injuries.

<sup>23</sup> Additionally, under Florida's Financial Responsibility Law (ch. 324, F.S.), motorists must provide proof of ability to pay monetary damages for bodily injury and property damage liability at the time of motor vehicle

The Florida Automobile Joint Underwriting Association (FAJUA) was created in 1973 pursuant to an Order issued by the Insurance Commissioner with the announced purpose to be an "insurer of last resort" to provide motor vehicle insurance to applicants who were unable to procure such coverage through the voluntary or competitive market due to a variety of factors, including driving history or status as first-time drivers.<sup>24</sup> Every insurer authorized to write automobile liability insurance or automobile physical damage insurance in Florida is required to be a member of the FAJUA. Expenses, losses, or profits of the Association are apportioned among the insurer members in the ratio to their representation in the voluntary Florida market.

The affairs of the Association are managed and controlled by a Board of Governors composed of 11 members: five are appointed by the Insurance Commissioner (two of whom must be chosen from the insurance industry) and six are appointed by the participating insurers (two of whom must be selected from the insurance agents' associations). The FAJUA has a staff of four people and, under the direction of the Board of Governors, contracts with one servicing carrier (American Insurance Group) which issues policies, underwrites risks, processes claims, adjusts losses, and keeps data on all its operations and reports it to the Automobile Insurance Plans Service Office (AIPSO). The Service Office, also under contract with the FAJUA, assembles the data obtained from AIG and develops financial and rate making information for the Association.<sup>25</sup> Additionally, the AIPSO, utilizing data collected from all insurers, determines the participation percentage of each insurer member of the FAJUA. It then allocates to each member its share of premium, losses, expenses and services fees.

The Florida Department of Insurance regulates FAJUA activity in that rate filings, form content, and plan of operations changes are subject to prior approval by the Department before they become effective. Based on figures for September 30, 2002, the FAJUA had a total of 43,593 policies in force.

accidents or when serious traffic violations occur.

<sup>24</sup> See Footnote 1, above.

<sup>25</sup> AIPSO also provides administrative services to the FAJUA, including data processing, personnel, preparation of tax forms, and statistical analysis.

**Current Public Records and Public Meetings Exemptions for the Florida Automobile Joint Underwriting Association** - During the 1998 Legislative Session, the Legislature enacted ch. 98-315, F.S., which amended s. 627.311(3)(1), F.S., to provide that the FAJUA be subject to the public records requirements of ch. 119, F.S., and to the public meetings mandates of s. 286.011, F.S. However, the following records of the FAJUA were exempt from such requirements:

1. Underwriting files (except that a policyholder or applicant has access to his or her own underwriting files).
2. Claims files, until termination of all litigation and settlement of all claims arising out of the same incident. However, confidential claims files may be released to other governmental agencies upon written request and demonstration of need so long as such records remain confidential and exempt.
3. Records obtained or generated by an internal auditor, until the audit is completed or if the audit is part of an investigation, until the investigation is closed or ceases to be active.
4. Privileged attorney-client communications.
5. Proprietary information licensed to the FAJUA under contract when the contract provides for the confidentiality of such information.
6. Information relating to the medical condition or status of a FAJUA employee which is not relevant to the employee's capacity to perform his or her duties. Such information may include workers' compensation, insurance benefits, and retirement or disability benefit records.
7. Records relating to an employee's participation in a employee assistance program designed to assist any employee who has a behavioral or medical disorder, substance abuse problem, or emotional difficulty which affects the employee's job performance.
8. Information relating to negotiations for financing, reinsurance, depopulation, or contractual services, until the conclusion of the negotiations.
9. Minutes of closed meetings regarding underwriting files, open claims files, until termination of all litigation, and settlement of all claims with regard to that claim, except that otherwise confidential or exempt information must be redacted, i.e., blacked out in the copy to be released.

The law also provides that an insurer considering underwriting a risk insured by the FAJUA may have access to relevant underwriting files and claims files provided the insurer agrees in writing, notarized and

under oath, to maintain their confidentiality. The FAJUA may also release the following information obtained from underwriting and confidential claims files to licensed general lines insurance agents (who must maintain the confidentiality of the information): name, address, and telephone number of the automobile owner or insured, location of the risk, rating information, loss history, and policy type.

In addition to these exemptions, the law provides for confidentiality of those portions of meetings in which confidential underwriting files or confidential open claims files are discussed. These closed portions of meetings must be recorded by a court reporter and the FAJUA must retain the court reporter's notes for at least 5 years. A copy of the transcript of closed portions of meetings, less any exempt matters, becomes public after the claim is settled.

**Sunset Review Issues** - As noted above, the Open Government Sunset Review Act requires that the review process for the public records and public meetings exemptions include consideration of the following questions:

- *What specific records or meetings are affected by the exemption?* The specific FAJUA records which are part of the underwriting files include: the applicant driver's motor vehicle driving records, policies and endorsements, credit information, premium finance contracts, payment history, past claims information, fraud investigation information, etc. Records of commercial underwriting files include: applicant's income tax returns, audited financial statements, auto inspection reports, employee vehicle driving records, payroll records, federal fuel tax reports, ICC filings, etc. The records contained in claims files include what is in the underwriting files along with attorney-client privileged information, data relating to case reserves, settlement documents, extensive personal medical information, etc. In addition to the above, exempt records include internal audit information, proprietary information, FAJUA employee medical data, along with employee assistance information, and information relating to financial negotiations. The portions of closed meetings which are exempt include discussion of the underwriting and claims files until termination of all litigation and settlement of the claim.
- *Whom does the exemption uniquely affect, as*

*opposed to the general public?* The applicant driver who is the subject of the FAJUA underwriting file, and the claimant, insured, attorneys, and the FAJUA, as to open claim files.

- *What is the identifiable public purpose or goal of the exemption?* According to FAJUA staff, the activities of the Association can readily be analogized to that of a private automobile insurance provider and, as such, the exemptions under review protect sensitive business and proprietary confidential information, the release of which could injure the FAJUA in the marketplace and disrupt the effective and efficient administration of the Association. Further, the medical records of Association employees contain personal, sensitive information, the disclosure of which would be harmful to the employee. Likewise, underwriting and claim files, and meetings which contain discussions of same, contain personal medical and financial information regarding applicants and insureds, the disclosure of which would be harmful to those persons. Additionally, matters encompassed in attorney-client communications would, if disclosed, jeopardize pending litigation or other legal matters. Records of internal audits contain incomplete information which would, if released, injure the business of the FAJUA.
- *Can the information contained in the records or discussed in the meetings be readily obtained by alternative means? If so, how?* The information cannot be generally obtained by alternative means by persons other than the parties involved with the FAJUA. However, claims files are released, along with the minutes of meetings where such files are discussed, when litigation is terminated and the claim is settled (with the exception of medical information). Likewise, audit reports are released when completed.

**Analysis of Public Purpose** - As discussed above, the Open Government Sunset Review Act prescribes that a public records or public meetings exemption may be maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the purpose it serves. An identifiable public purpose is served if the exemption meets *one* of the following purposes:

- (a) Does the exemption allow the state or its political subdivisions to effectively and efficiently

administer a governmental program, which administration would be significantly impaired without the exemption;

- (b) Does the exemption protect information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this paragraph, only information that would identify the individuals may be exempted; or,
- (c) Does the exemption protect information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

Based upon the input of the FAJUA administrators and upon review of the stated exemptions, this report finds that the exemptions contained in s. 627.311,(3)(l), F.S., satisfy two of the above conditions: (a) and (b).

First, the exemptions allow the FAJUA to effectively and efficiently administer its motor vehicle insurance program. Administrators with the FAJUA cautioned that, in the absence of the public records exemptions, the Association would be unable to properly administer its claims and be unable to defend unwarranted claims. Furthermore, the FAJUA would not be able to properly administer its underwriting responsibilities if such information was made public because the information is proprietary to the Association. The Legislature created the FAJUA to help insure those drivers unable to obtain insurance in the voluntary market. Making claims and underwriting files public would be contrary to the broader public policy goals of the program.

Secondly, the exemption protects information of a sensitive personal nature concerning applicant drivers, claimants and insureds filing claims, and FAJUA employees' medical files. Release of such information to the public would cause unwarranted damage to the good name or reputation of such individuals. Also, releasing attorney-client information would give opposing counsel in a claim suit an improper advantage during the course of

litigation. If records generated by an internal FAJUA investigative audit were released, persons or companies would unfairly be exposed to potential damage to their names and reputations based on incomplete audit information.

Thus, the public records and public meetings exemptions within s. 627.311(3)(l), F.S., appear to meet the requirements of “public purpose” within the meaning of the Open Government Sunset Act of 1995, and therefore deserve reenactment.

However, there is one provision within the FAJUA exemption law which committee staff recommends be removed. That provision is in s. 627.311(3)(l)d, F.S., which states that “matters reasonably encompassed in privileged attorney-client communications” be exempt. This language is too broad and there already exists an attorney public records exemption contained in the Public Records Law (s. 119.07(3)(l), F.S.). The Public Records attorney provision is drawn more narrowly and precisely and provides that public records prepared by agency<sup>26</sup> attorneys which reflect the mental impression, litigation strategy, or legal theory and were prepared in anticipation of litigation or adversarial proceedings is exempt from the public records provisions. The provision further states that the attorney’s records become public at the conclusion of the litigation or adversarial proceedings.

Additionally, staff recommends that technical conforming changes be made to the FAJUA exemption provisions and that references pertaining to the Department of Insurance and Insurance Commissioner in s. 627.311(3)(l), F.S., conform to ch. 2002-404, L.O.F., which abolished the Department of Insurance and created the position of Chief Financial Officer. Under ch. 2002-404, L.O.F., the Office of Insurance Regulation is responsible for all activities concerning insurers and “risk bearing entities.” The FAJUA is a risk bearing entity because it functions as an insurance company servicing the residual market. Furthermore, the Chief Financial Officer now has the statutory responsibility under ch. 2002-404, L.O.F., for appointments to associations which was vested in the Insurance Commissioner.

## **RECOMMENDATIONS**

Staff recommends that the FAJUA public records and public meetings exemptions (s. 627.311(3)(l), F.S.) be reenacted and that the exemption pertaining to attorney-client communications be deleted because that provision is too broad and there currently exists an attorney records exemption under ch. 119, F.S., (Public Records Law). Furthermore, technical conforming changes are recommended to clarify certain of the FAJUA public records and public meetings exemptions, and it is recommended that references pertaining to the Department of Insurance and Insurance Commissioner in s. 627.311(3)(l), F.S., conform to ch. 2002-404, L.O.F., which abolished the Department of Insurance and created the position of Chief Financial Officer.

<sup>26</sup> The FAJUA would be considered an “agency” under the definition contained in s. 119.011(2), F.S.