



# The Florida Senate

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Committee on Banking and Insurance

Senator Rudy Garcia, Chair

## OPEN GOVERNMENT SUNSET REVIEW OF S. 626.921, F.S., SURPLUS LINES

### SUMMARY

The public records exemption for information specific to a particular policy or policyholder furnished to the Florida Surplus Lines Service Office (FSLSO or Surplus Lines Office) under the Surplus Lines Law, as provided in s. 626.921(8)(b), F.S., is scheduled for repeal on October 6, 2006, unless reviewed and saved from repeal through reenactment by the Legislature pursuant to the criteria specified in the Open Government Sunset Review Act, s. 119.15, F.S.

Surplus lines insurance is insurance coverage provided by a company that is not licensed in Florida, but is allowed to transact insurance in the state as an "eligible" surplus lines insurer. The purpose of the surplus lines law is to provide access to insurers that are not authorized to transact business in Florida when certain insurance coverages cannot be obtained from Florida-authorized insurers. Insurance may only be purchased from a surplus lines carrier if the necessary coverage cannot be procured from authorized insurers. Surplus lines agents are authorized to handle the placement of insurance coverages with surplus lines insurers.

Surplus lines insurance agents are required to submit to the FSLSO information about each surplus lines policy written, including the facts about the policy, the name of the insured and insurer, the type of coverage purchased, premium charged, the zip code and county of location for the risk and other information. If requested by the Surplus Lines Office, the agent must furnish an exact copy of a requested policy, including applications, certificates, cover notes, other forms of confirmation of insurance coverage, substitutions or endorsements. Additionally, surplus lines agents must maintain records for 5 years of each surplus lines contract that are open to examination by either the Department of Financial Services (DFS) or the Surplus Lines Office.

Committee staff recommends that the public records exemption for information specific to a particular policy or policyholder furnished to the Florida Surplus Lines Service Office under the Surplus Lines Law be reenacted. Exempting this information from public disclosure is justified because of the personal nature of the economic information involved, the revealing of which would be an unwarranted invasion of privacy to a policyholder. The exemption is further justified because revealing such information would be harmful to insurers and agents due to the economic value of such information if revealed to competitors.

### BACKGROUND

#### Public Records Law

The Legislature enacted its first law affording access to public records in 1909. In 1992, Floridians adopted an amendment to the state constitution that raised the statutory right of access to public records to a constitutional level. Article I, s. 24(a) of the State Constitution provides that:

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. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public Records Law<sup>1</sup> also specifies conditions under which the public must have access to

<sup>1</sup> Chapter 119, F.S.

governmental records. Section 119.011(11), F.S., defines the term “public records” to include:

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 of public records to include all materials made or received by an agency in connection with official business which are used “to perpetuate, communicate, or formalize knowledge.”<sup>2</sup> Unless the Legislature makes these materials exempt, they are open for public inspection, regardless of whether they are in final form.<sup>3</sup>

Under Article I, s. 24 (c) of the State Constitution, the Legislature may provide for the exemption of records from the open government requirements provided: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law.

### Open Government Sunset Review Act

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption. An “exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.”<sup>4</sup>

An exemption may be created, revised or maintained only if it serves an identifiable public purpose, and it may be no broader than necessary to meet that purpose. An identifiable public purpose is served if the exemption meets one of the following purposes and the

Legislature finds that the purpose is sufficiently compelling to override the strong policy of open government and cannot be accomplished without the exemption:

The exemption allows “the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.”

The exemption protects “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.”

The exemption protects “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.”<sup>5</sup>

Section 119.15(6)(a), F.S., requires, as part of the review process, the consideration of the following questions:

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?
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?

## METHODOLOGY

Staff reviewed the law and committee files for the legislation that initially created the public records exemption under review, and other public records exemptions. Related rules were also reviewed. A questionnaire prepared jointly with the House Governmental Operations Committee was sent to the

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

<sup>3</sup> See *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979).

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

<sup>5</sup> Section 119.15(6)(b), F.S.

Florida Surplus Lines Service Office, whose responses provided additional information and recommendations. Staff conducted follow-up interviews with Surplus Lines Service Office representatives and other interested parties.

## FINDINGS

### Surplus Lines Insurance Coverage

Insurance companies that transact insurance in Florida or that have offices located in the state are required to obtain a certificate of authority (COA) issued by the Office of Insurance Regulation pursuant to s. 624.401, F.S. Generally, an insurer that does not have a certificate of authority to transact insurance business in Florida and does so is considered an unauthorized insurer and has committed insurance fraud. However, exceptions exist to the COA requirement, the primary one being for surplus lines insurers.

Surplus lines insurance is insurance coverage provided by a company that is not licensed in Florida, but is allowed to transact insurance in the state as an “eligible” insurer. The purpose of the surplus lines law is to provide the insurance purchasing public with access to insurers that are not authorized to transact business in Florida when certain insurance coverages cannot be obtained from Florida-authorized insurers.<sup>6</sup> Insurance may only be purchased from a surplus lines carrier if the necessary amount of coverage cannot be procured after a diligent effort<sup>7</sup> to buy the coverage from authorized insurers. Rates charged by a surplus lines carrier may not be more favorable than in use and offered by the majority of authorized insurers writing similar coverages on similar risks in Florida.<sup>8</sup>

The Florida Insurance Code contains specific financial and other requirements that unauthorized insurers must comply with in order to become eligible surplus lines insurers and obtain approval by the Office of Insurance Regulation (OIR). For example, a surplus lines insurer must maintain a surplus as to policyholders of not less than \$15 million, have been licensed in its state or country of domicile for at least three years, and furnish annual and quarterly financial statements to the OIR.<sup>9</sup>

Surplus lines insurance is not subject to Florida regulation of rates or forms and there is no insurance guaranty fund protection if the insurer becomes insolvent. However, premiums charged for surplus lines coverages are subject to a premium receipts tax of 5 percent of all gross premiums charged.<sup>10</sup>

Currently, approximately 140 insurers are qualified to sell surplus lines insurance in Florida. Various forms of commercial and residential property insurance have the highest amounts of premium dollars collected via surplus lines. During 2004, the top ten coverages in premium dollars written were as follows:<sup>11</sup>

Coverage Type	Premium	Policies
Commercial Property	\$875,667,388	62,905
Commercial General Liability	\$606,315,605	104,999
Commercial Package (Property & Casualty)	\$189,235,965	60,105
Homeowners-Ho-3	\$164,320,686	94,282
Commercial Umbrella Liability	\$133,223,663	2,522
Miscellaneous E&O Liability	\$70,404,206	4,059
Excess Commercial General Liability (Not Umbrella)	\$64,861,907	2,034
Miscellaneous Medical Professionals	\$58,851,421	1,334
Builders Risk	\$46,660,109	2,354
Hospital Professional Liability	\$45,206,007	60

### Florida Surplus Lines Service Office

In 1997, the Legislature created the Florida Surplus Lines Service Office (Service Office or FLSO), a non-profit association designed to act as a “self-regulating organization” to permit better access by consumers to approved surplus lines insurers.<sup>12</sup> The Surplus Lines Service Office is governed by a nine person board of governors consisting of eight members

<sup>6</sup> Section 626.913(2), F.S.

<sup>7</sup> See s. 626.914(4), F.S. A “diligent effort” is defined as seeking coverage from and being rejected by at least three authorized insurers that write the type of coverage being sought. The rejections must be documented.

<sup>8</sup> Section 626.916(1)(b), F.S.

<sup>9</sup> Section 626.918, F.S.

<sup>10</sup> See s. 626.932, F.S. The FLSO forwards the taxes to the DFS, which then deposits 24.3 percent of the funds into the Insurance Regulatory Trust Fund, and 75.7 percent into the General Revenue Fund.

<sup>11</sup> Information provided from a 2004 Market Data Report on the website of the Florida Surplus Lines Service Office at [www.fslso.com/market/reports/CCT25\\_Select.asp](http://www.fslso.com/market/reports/CCT25_Select.asp)

<sup>12</sup> Ch. 97-196, L.O.F.

appointed by the Department of Financial Services<sup>13</sup> with the insurance consumer advocate being the ninth member.<sup>14</sup> The FLSO is required to perform its functions under a plan of operation that is subject to the approval of the Office of Insurance Regulation.

The Florida Surplus Lines Service Office is required to conduct the following activities:<sup>15</sup>

- Receive, record and review all surplus lines insurance policies
- Maintain records of the policies reported to the service office and perform reports as required by Financial Services Commission<sup>16</sup>
- Prepare and deliver to each surplus lines agent quarterly reports of each agent's business
- Collect and remit to the DFS the surplus lines tax as provided for in s. 626.932, F.S.
- Reconcile the policies provided by non-admitted insurers with the policies reported to the service office by agents
- Collect monthly from each surplus lines agent a service fee of .25 percent<sup>17</sup>
- Other activities as specified by statute.

### Florida Surplus Lines Agents

Surplus lines agents are authorized to handle the placement of insurance coverages with surplus lines insurers, and to place coverages with authorized insurers with whom the agent is not licensed.<sup>18</sup> Licensed resident general lines agents who meet the statutory criteria for licensure are eligible for licensure as a surplus lines agent.<sup>19</sup> In order to place

<sup>13</sup> Five members of the board are from the regular membership of the Florida Surplus Lines Association, one from each of the two largest domestic agents associations who are also licensed surplus lines agents, and a risk manager from a large domestic commercial enterprise.

<sup>14</sup> Section 626.921(4), F.S.

<sup>15</sup> See generally subsections (3) and (6) of s. 626.921, F.S.

<sup>16</sup> Currently, the Surplus Lines Office is required to prepare a "Quasar" report that includes new business reported by agents, policy cancellations, and policy renewals.

<sup>17</sup> See Section 626.921(3)(f), F.S. The Service Office is authorized to collect up to .3 percent of total gross premium. The fee is used to pay for the cost of operating the Service Office and is to be paid by the insurer.

<sup>18</sup> Section 626.914(1), F.S.

<sup>19</sup> Section 626.927, F.S. Generally, to be licensed as a surplus lines agent, an individual must be: (1) deemed by the DFS to have sufficient experience in the insurance business (2) have 1 year's experience working for a

business with a surplus lines carrier, the agent must make a "diligent effort" to place the policy with a Florida-authorized insurer, which is shown by having three written rejections of coverage from insurers currently writing the type of insurance being sought.<sup>20</sup> Representatives from the FLSO state that approximately 800 agents are licensed currently to transact surplus lines coverage, with about 440 agents actively reporting to the surplus lines office.

Surplus lines agents are required to report and file with the FLSO a copy of, or information on, each surplus lines insurance policy as required in the FLSO board of governors plan of operation.<sup>21</sup> Agents must comply with the Agents Procedure Manual adopted by the DFS, which requires agents to submit specific information on each policy including the name of the insured and insurer, the policy number and its effective date, the policy's expiration date, the zip code and county where the covered risk is located, the type of coverage, the premium, effective date, service fees and other information. Surplus lines agents are also required by statute to submit a quarterly report to the service office that includes an affidavit stating all surplus lines insurance transacted by the agent during the calendar quarter that has been submitted to the service office as required.<sup>22</sup> The affidavit must also include efforts made to place coverages with authorized insurers and the results of those efforts.

When requested by the DFS or the FLSO, surplus lines agents are also required to submit to the service office an exact copy of any and all requested policies and other forms of confirming insurance policies<sup>23</sup> along with any substitutions or endorsements.<sup>24</sup> Upon request, the agent may also be required to submit the agent's memorandum as to the substance of any change represented by a substitute certificate, cover note, other form of confirmation of insurance coverage, or endorsement as compared with the coverage as originally placed or issued.<sup>25</sup> A request is typically only made by the department or surplus lines office for purposes of investigating an agent for

licensed surplus lines agent or have completed 60 class hours in an approved surplus lines course, and (3) pass a written examination.

<sup>20</sup> Section 626.914(4), F.S.

<sup>21</sup> Section 626.921(2), F.S.

<sup>22</sup> Section 626.931, F.S.

<sup>23</sup> Such as applications, certificates, and cover notes.

<sup>24</sup> Section 626.923, F.S.

<sup>25</sup> See id.

a suspected violation such as non-payment of the surplus lines tax, misappropriation of funds, or improper placement of business in the surplus lines market.

Surplus lines agents are required to maintain in their agency office for a period of 5 years each surplus lines contract, including applications and all certificates, and any substitutions or endorsements.<sup>26</sup> The information must include the amount of the insurance and perils insured against; the location of the insured property and a brief description; gross premium charged; return premium paid; rate of premium charged upon the several items of property; effective date of the contract and its terms; the name and post office address of the insured; the name and home-office address of the insurer; the amount collected from the insured; and other information that is required by the department. As noted, the department typically examines this information when an agent is being investigated for a suspected violation.

#### **Public Records Exemptions for Information Reported by Surplus Lines Agents**

The public records exemptions in s. 626.921(8), F.S., protect from disclosure information reported by surplus lines agents that would reveal information specific to a particular policy or policyholder. The exemption in paragraph (a) of s. 626.921(8), F.S., applies to information submitted to the Department of Financial Services. The information that surplus lines agents submit to the Department of Financial Services under s. 626.923, F.S., and information contained in records subject to examination by the DFS under s. 626.930, F.S., is confidential and exempt from the Public Records Law.

A second exemption for information furnished to the FLSO under the Surplus Lines Law is contained in paragraph (b) of s. 626.921(8), F.S. This exemption does not prevent the disclosure of information by the FLSO to the DFS, but the public records exemption does apply to records obtained by the DFS from the Surplus Lines Office. This second public records exemption for information furnished to the FLSO shall stand repealed on October 2, 2006, unless reviewed in accordance with the Open Government Sunset Review Act<sup>27</sup> and reenacted by the Legislature.

<sup>26</sup> Section 626.930, F.S.

<sup>27</sup> Section 119.15, F.S.

#### **History of the Public Records Exemption for Information Submitted by Surplus Lines Agents**

Prior to the creation of the Florida Surplus Lines Service Office in 1997, surplus lines agents were required to submit quarterly reports<sup>28</sup> to the Department of Insurance. The quarterly reports included aggregate gross and net premiums and a listing of all policies issued. There was no automatic filing requirement for policy forms or detailed information regarding each policy, but the agent was required to file a copy of a policy and provide other specific information upon the request of the Department of Insurance.<sup>29</sup> The agent was also required to maintain certain information about each policy subject to examination by the Department of Insurance.<sup>30</sup> A public records exemption existed for policy-specific information submitted pursuant to the request of the Department of Insurance, or contained in records maintained by an agent subject to examination if the disclosure would reveal a trade secret as statutorily defined. No public records exemption existed for the quarterly reports of aggregate data submitted to the Department of Insurance.

The 1997 legislation<sup>31</sup> creating the Surplus Lines Service Office amended the statutes to require surplus lines agents to file quarterly reports with the service office, rather than with the Department of Insurance.<sup>32</sup> The 1997 act also required surplus lines agents to file with the service office such information on each policy as required in the plan of operation adopted by the board and approved by the department.<sup>33</sup> The 1997 act did not provide a public records exemption for the information agents were required to submit to the Florida Surplus Lines Service Office. However, the public records exemption already provided in the law was maintained for information submitted by agents to the Department of Insurance pursuant to its request or examination, if the disclosure would reveal a trade secret. The only change made to the exemption was

<sup>28</sup> Section 626.931 (1995 F.S.)

<sup>29</sup> Section 626.923 (1995 F.S.)

<sup>30</sup> Section 626.930 (1995 F.S.)

<sup>31</sup> Ch. 97-196, L.O.F.

<sup>32</sup> Section 626.931, F.S., as amended by s. 4 of ch. 97-196, L.O.F.

<sup>33</sup> Section 626.921, F.S., as amended by s. 4 of ch. 97-196, L.O.F.

scheduling it for future repeal and review under the Open Government Sunset Review Act.

The public records exemption was reviewed and saved from repeal by the Legislature during 2001. During the review process of the public records exemption, the Senate interim report on the exemption recommended that the exemption either be retained, or made more specific by applying to information that is specific to an individual policy,<sup>34</sup> rather than information that reveals a trade secret. The Legislature reenacted the public records exemption, applying it to information that would reveal information specific to a particular policy or policyholder.

Also, it was recommended that a new exemption be enacted for surplus lines information submitted to the Florida Surplus Lines Service Office under the same conditions that apply to such information submitted to the Department of Insurance. Two reasons were given for this recommendation. First, the then-existing public records exemption protected certain information submitted or maintained pursuant to s. 626.923, F.S., and 626.930, F.S., but did not refer to information required to be filed with the service office under s. 626.921(2), F.S., which provides statutory authority for mandatory reporting by agents to the service office of information on each surplus lines policy sold. Second, although the surplus lines office is a non-profit association, the Office of the Attorney General has issued numerous opinions advising that if a nonprofit entity is created by law—such as the Florida Surplus Lines Service Office—it is subject to Chapter 119 public records disclosure requirements.<sup>35</sup> The service office essentially performs a regulatory function on behalf of the Department of Financial Services by collecting the data necessary to determine if surplus lines agents are paying the appropriate surplus lines tax and assisting the Department in enforcement of other surplus lines laws. Therefore, the FLSO is subject to the Public Records Law. If the exemption for information submitted to the Department had not also been created for information submitted to the service office, it would have created an opening for persons to obtain information specific to a particular policy or

policyholder, thus thwarting the purposes of the then-existing exemption. For these reasons, the Legislature enacted an additional exemption for information furnished to the Surplus Lines Service Office under the same criteria as applied to the exemption for information submitted to the Department of Insurance.

In 2003, the Department of Insurance was eliminated and reorganized into the Department of Financial Services. As a result, all references in the public records exemption to information submitted to the Department of Insurance instead referenced information submitted to the Department of Financial Services.

In reviewing the current Florida Surplus Lines Service Office Plan of Operation and Articles of Agreement (Plan of Operation) it is apparent that Section 11 is outdated. Section 11 deals with the confidentiality of information covered by a public records exemption. The Plan of Operation states that the confidentiality of information will be maintained if disclosure would reveal a trade secret. Prior to 2001, the basis of the public records exemption in s. 626.921, F.S., was a trade secret rationale, but that was changed to information specific to a particular policy or policyholder. Additionally, Section 11 does not make any reference to the public records exemption for information furnished to the FLSO under the Surplus Lines Law (s. 627.913, F.S.-s. 627.937, F.S.) contained in s. 626.921(8)(b), F.S. The Plan of Operation only addresses information furnished to the Department.

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act prescribes certain questions that must be considered by the Legislature in determining whether to reenact a public records exemption. Section 119.15(6)(a), F.S., requires as part of the review process the consideration of the following specific questions:

#### ***What specific records or meetings are affected by the exemption?***

The statute specifies that “identifying information” contained in the information furnished to the Florida Surplus Lines Service Office under the Surplus Lines Law is confidential and exempt from public disclosure. Identifying information is defined in statute as information specific to a particular policy

<sup>34</sup> See *Public Records Exemption for Surplus Lines Insurance Records Furnished to the Department of Insurance*, Florida Senate Interim Project Report 2001-028 (September 2000).

<sup>35</sup> See *Government in the Sunshine Manual*, 2005 Electronic Ed., Office of the Atty. Gen., pp. 16-19.

or policyholder. This is interpreted by the Florida Surplus Lines Service Office to include:

- the name and address of the insured and the insurer,
- the type of coverage in each policy,
- the amount of coverage in each policy,
- the premium charged,
- the effective date of the policy,
- fees charged,
- deductibles.

***Whom does the exemption uniquely affect?***

Insurance companies and insurance agencies are likely to be uniquely affected by this public records exemption, as it is these two groups that would most likely seek this information in order to learn the business practices of competitors and the location, financial practices and financial condition of potential customers. The exemption also affects surplus lines policyholders, since the information describes specific economic information about each surplus lines policy.

***What is the exemption’s public purpose or goal?***

The Legislature declared that the public purpose of the exemption for information specific to a particular policy or policyholder is that disclosure of such information “would be harmful to insurers or agents due to the economic value of such information if revealed to competitors. Such information may also reveal economic information about the policyholder that would be harmful as an invasion of privacy to the policyholder.”<sup>36</sup>

***Is the information otherwise readily obtainable?***

Representatives from the Florida Surplus Lines Service Office indicate to staff that the information held confidential under the public records exemption is not otherwise available. Information on each policy is generally only obtainable by the parties to the insurance contract (insurer and insured) and the surplus lines agent who facilitated the policy.

***Is the record or meeting protected by another exemption?***

No. The public records exemption contained in s. 626.921(8)(b), F.S., is the only exemption in the Florida Statutes regarding information furnished to

the Florida Surplus Lines Service Office under the Surplus Lines Law.

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

No. There are no other public records exemptions for information furnished to the Florida Surplus Lines Service Office under the Surplus Lines Law that could be combined with the exemption contained in s. 626.921(8)(b), F.S.

## RECOMMENDATIONS

Staff recommends that the public records exemption in s. 626.921(8)(b), F.S., be maintained and reenacted, for information furnished to the Florida Surplus Lines Service Office that would reveal information specific to a particular policy or policyholder.

Staff further recommends that the Florida Surplus Lines Service Office amend Section 11 of the Florida Surplus Lines Service Office Plan of Operation and Articles of Agreement to conform to the current statutory public records exemption language found in s. 626.921(8), F.S.

<sup>36</sup> Chapter 2001-181, L.O.F.