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Committee on Banking and Insurance

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 624.319(3)(B), F.S., PERTAINING TO WORKPAPERS OF EXAMINATIONS OR INVESTIGATIONS BY THE DEPARTMENT OF FINANCIAL SERVICES OR THE OFFICE OF INSURANCE REGULATION

SUMMARY

In 2002, legislation was enacted creating a public records and public meetings exemption (under s. 624.319(3)(b), F.S.) for workpapers and other information held by the Department of Financial Services (DFS or department) or the Office of Insurance Regulation (OIR or office) and workpapers and other information received from another governmental entity or the National Association of Insurance Commissioners (NAIC), for use by the DFS or the OIR in the performance of their examination or investigation duties pursuant to specified sections of the Insurance Code.¹ The exemption is scheduled for repeal on October 2, 2007, unless reviewed and saved from repeal through reenactment by the Legislature pursuant to the criteria specified in the Open Government Sunset Review Act (Act), s. 119.15, F.S.

Based on the staff's review of the exemption under the Act's criteria, it is recommended that the specified exemption be reenacted since it is necessary for the effective and efficient administration of a government program and the protection of sensitive and confidential information received from other governmental entities or the NAIC. However, staff also recommends the following changes to the current exemption:

1. Narrow the exemption to specify that workpapers and other information prepared by, or for the use of, the department or office in the performance of its examination duties are confidential and exempt until the examination report is filed. After an examination report is filed, portions of the referenced workpapers

and other information may remain confidential and exempt if disclosure would:

- a. Jeopardize the integrity of another active examination;
- b. Impair the safety and financial soundness of the licensee or affiliated party;
- c. Reveal personal financial, medical or health information;
- d. Reveal the identity of a confidential source;
- e. Defame or cause unwarranted damage to the good name or reputation of an individual or jeopardize the safety of an individual; or,
- f. Reveal examination techniques or procedures.

2. Narrow the exemption by making confidential and exempt the workpapers and other information the department or office receives from another governmental entity or the NAIC relating to the department's or office's examination or investigation duties only if the governmental entity or the NAIC provide the information on the condition that it remain confidential and exempt.

BACKGROUND

Public Records Law

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.² Article I, s. 24 of the State Constitution, provides that:

¹ Chapter 2002-185, L.O.F.

² 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 Act³ 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 agency⁴ records are available for 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.⁵

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.⁶ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁷

Only the Legislature is authorized to create exemptions to open government requirements.⁸ 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.⁹ A bill enacting an exemption¹⁰ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹¹

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.¹² If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹³

The Open Government Sunset Review Act¹⁴ 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 exemption. An identifiable public purpose is served if the exemption:

⁸ Article I, s. 24(c) of the State Constitution.

⁹ *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).

¹⁰ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹¹ Art. I, s. 24(c) of the State Constitution.

¹² Attorney General Opinion 85-62.

¹³ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁴ Section 119.15, F.S.

³ Chapter 119, F.S.

⁴ 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. . .”

⁵ Section 119.011(11), F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁷ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- [p]rotects 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
- [p]rotects 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.¹⁵

The act also requires consideration of the following:

- 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?

METHODOLOGY

To complete this review, staff researched the relevant law and case law for the applicable statutory provisions. A questionnaire was prepared and sent to representatives with the Office of Insurance Regulation and the Department of Financial Services concerning the use of and need for the exemption. Staff conducted follow-up interviews with agency personnel, the First Amendment Foundation and other stakeholders.

¹⁵ Section 119.15(4) (b), F.S.

FINDINGS

Examination and Investigation Duties of the Office of Insurance Regulation and the Department of Financial Services

The Office of Insurance Regulation and the Department of Financial Services each have distinct regulatory powers related to insurance. The OIR is responsible for all activities concerning insurers and other risk-bearing entities such as licensing, solvency, rates, and policy forms.¹⁶ The DFS is responsible, among other duties, for the regulation of insurance representatives and other individuals who are licensed to sell insurance-type products.¹⁷

The OIR is mandated to conduct market conduct examinations and financial oversight examinations of authorized insurers as often as it deems necessary in order to review the insurers' affairs, records, transactions, accounting procedures and financial condition and to ascertain compliance with the applicable provisions of the Insurance Code.¹⁸ These examinations scrutinize property, causality, life and health insurance entities. Rather than conduct all reviews on a calendar basis, industry problems are identified through market analysis by trending patterns and practices of consumer complaints, financial data and other data available through market and environmental sources. Once adverse business practices are identified, specific companies, markets or insurance products are examined. The law does, however, require examinations of domestic insurers to be conducted not less frequently than once every 3 years and, under certain specified circumstances, once every year.

According to representatives with the office, the agency conducted approximately 231 insurer examinations in 2004. The office is required to make public the report of each examination; however, such reports are confidential and exempt from public disclosure (under a separate public records exemption) until they are filed.¹⁹ Each examination report must contain only information obtained from the examination of records, accounts and documents relating to the insurer examined or from testimony of individuals taken under oath, together with relevant conclusions and recommendations of the examiner. A copy of the report

¹⁶ Sections 20.121(3)(a)1. and 626.016, F.S.

¹⁷ Sections 20.121(2) and 626.016, F.S.

¹⁸ Sections 624.316 and 624.3161, F.S.

¹⁹ Section 624.319(3)(a), F.S.

must be furnished to the insurer examined within 30 days prior to the filing of the report. The examined insurer may request a hearing with respect to the subject report and such report is also admissible in evidence in any action or proceeding brought by the office.

Both the OIR and DFS have the authority to conduct investigations of insurers²⁰ and insurance representatives, respectively, if either agency has reason to believe that the Insurance Code has been or is being violated or it receives a written signed complaint indicating that a violation may exist.²¹ The number of insurer investigations conducted by the office was 834 in 2004, while the department conducts approximately 2,000 investigations every year. Agency investigation reports are confidential and exempt (under a separate public records exemption) until the investigation has been completed or ceases to be active.²² However, portions of the investigation report may remain confidential and exempt if disclosure would:

1. Jeopardize the integrity of another active investigation;
2. Impair the safety and financial soundness of the licensee or affiliated party;
3. Reveal personal financial information;
4. Reveal the identity of a confidential source;
5. Defame or cause unwarranted damage to the good name or reputation of an individual or jeopardize the safety of an individual; or,
6. Reveal investigative techniques or procedures.

Public Records Exemption Under Review

In 2002, section 624.319(3)(b), F.S., was enacted providing that:

“Workpapers and other information held by the department or office, and workpapers and other information received from another governmental entity or the National Association of Insurance Commissioners, for the department’s or office’s use in the performance of its examination or investigation duties pursuant to this section and ss. 624.316, 624.3161, 624.317, and 624.318, F.S., are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Such confidential and exempt information may be disclosed to another governmental entity, if disclosure is necessary for

the receiving entity to perform its duties and responsibilities, and may be disclosed to the National Association of Insurance Commissioners. The receiving governmental entity or the association must maintain the confidential and exempt status of the information. The information made confidential and exempt by this paragraph may be used in a criminal, civil, or administrative proceeding so long as the confidential and exempt status of such information is maintained. This paragraph is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2007, unless reviewed and saved from repeal through reenactment by the Legislature.”

The public necessity statement provides that disclosure of the information used in preparing examination reports and investigation reports would thwart the state’s interest in ensuring the integrity of the regulatory process. Also, such confidential and exempt information is, by its nature, incomplete and could be misleading and release of inaccurate or incomplete information could be detrimental to the persons and insurers examined or investigated. Furthermore, disclosure of this information would impair the ability of the department or office to gather information it needs to complete examinations or investigations because persons who would otherwise provide confidential information are unwilling to do so for fear that such information will not remain confidential.

Representatives with both the OIR and the DFS assert that the exemption is necessary for the effective and efficient administration of their examination and investigation responsibilities. The exemption facilitates the free exchange of information between their agencies, other state insurers, regulatory entities, law enforcement agencies and the National Association of Insurance Commissioners (NAIC).²³ For example, the OIR shares information with other state insurers and the U.S. Department of Labor (DOL) in cases involving unlicensed insurers operating across state lines. In these cases, if the DOL or other state has an open investigation, the materials they gather are confidential and they will only share information with

²⁰ The Office also investigates unauthorized insurers.

²¹ Section 624.317, F.S.

²² Section 624.319(3)(a), F.S.

²³ The National Association of Insurance Commissioners (NAIC) is the organization of insurance regulators from the 50 states, the District of Columbia and the five U.S. territories. Created in 1871, the NAIC provides a forum for the development of uniform policy and to coordinate the regulation of multistate insurers among the states.

the OIR if it can maintain the confidentiality of the material.

OIR officials also point to the “Information Sharing and Confidentiality Agreement” the agency signed in 2003, with all other participating state insurance regulators for the purpose of exchanging confidential information. Under the agreement, the OIR must agree to protect from disclosure confidential information that it requests and obtains from a responding agency to the same extent that the confidential information is protected from disclosure under the laws of the applicable responding agency and to take all actions necessary to preserve and maintain all privileges and protections. If the exemption was not in effect, OIR officials would be unable to obtain confidential information from other states or the NAIC in the performance of its examinations or investigations. Both OIR and DFS participate in multi-state examinations and investigations when insurers or insurance representatives are active in numerous states. The absence of the work paper exemption would greatly impair both agency’s ability to fully participate in multi-state examinations and investigations of these companies or agents. However, OIR or DFS may also obtain information from other governmental entities pursuant to an examination or investigation which is not subject to a confidentiality agreement. Since that is the case, there would not be a need to exempt such information from the public records law.

Concerns have been raised regarding the scope and use of the exemption by the First Amendment Foundation.²⁴ The Foundation asserts that the “workpapers and other information held” and “workpapers and other information received” by OIR and DFS are “unconstitutionally vague and overbroad.” Additionally, the Foundation states that the exemption was initially justified on the grounds that the exempt information could be used in preparing examination and investigative reports. However, such reports become public record (under a separate public records provision under s. 624.319(3)(a), F.S.) once filed or complete, rendering any further exemption for the workpapers and other information unnecessary.

The First Amendment Foundation had recommended the Governor veto the public records exemption

legislation (s. 624.319(3)(b), F.S.) in 2002 for the reasons it noted above. Confusion has resulted as to just what records are to remain confidential under this exemption because the other public records provision under (3)(a), F.S., as explained above and as noted by the Foundation, makes examination reports public after filing and investigations public after completion or when they cease to be active. Portions of investigations may remain confidential and exempt if one of six criteria are met. Under the instant exemption (3)(b), it is difficult to discern what workpapers and information are “held” by the two agencies, and thus are confidential and exempt. according to both the OIR and DFS, it could mean any information they receive from any person or entity if it is obtained as a result of an examination or investigation. This position contravenes both the letter and intent of the (3)(a) exemption which specifies, with conditions, that examinations and investigations become public, unless certain criteria are met.

In order to further the clear intent of the (3)(a) exemption (that examinations and investigations become public at some point) and to address the legitimate needs of the two agencies to protect the confidentiality of certain information, information gathered for agency examinations should be treated for public records purposes in the same fashion as information is presently treated for agency investigations.

RECOMMENDATIONS

Based on the staff’s review of the exemption under the Open Government Sunset Review Act’s criteria, it is recommended that the specified exemption be reenacted since it is necessary for the effective and efficient administration of a government program and the protection of sensitive and confidential information received from other governmental entities or the NAIC. However, staff also recommends the following changes to the current exemption:

²⁴ Letter from Barbara Petersen, President, First Amendment Foundation, to Jim Rhea, Senate Governmental Oversight and Productivity Committee (June 27, 2006) (copy on file with Banking and Insurance Committee staff).

1. Narrow the exemption to specify that workpapers and other information prepared by, or for the use of, the department or office in the performance of its examination duties are confidential and exempt until the examination report is filed. After an examination report is filed, portions of the referenced workpapers and other information may remain confidential and exempt if disclosure would:

- a. Jeopardize the integrity of another active examination;
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2. Narrow the exemption by making confidential and exempt the workpapers and other information the department or office receives from another governmental entity or the NAIC relating to the department's or office's examination or investigation duties only if the governmental entity or the NAIC provide the information on the condition that it remain confidential and exempt.