

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1478

SPONSOR: Banking and Insurance Committee and Senator Clary

SUBJECT: Public Records Exemption for Workpapers/Information held by the Department of Insurance

DATE: February 18, 2002

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Emrich	Deffenbaugh	BI	Favorable/CS
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Under Article I, Section 24, Florida Constitution, records and meetings of public bodies must be open to the public in the absence of an express exemption. The Legislature may grant exemptions by general law.

Committee Substitute for Senate Bill 1478 would create an exemption from the public records law for workpapers and other information held by the Department of Insurance (DOI) in the performance of the DOI's examination or investigation duties. The confidential information may be disclosed to another governmental entity, if such disclosure is necessary for the receiving entity to perform its duties and responsibilities and may also be disclosed to the National Association of Insurance Commissioners (NAIC). It mandates that the receiving entity maintain the confidential status of the information.

The bill provides that the confidential information may be used in criminal, civil, or administrative proceedings so long as the confidential status of the information is maintained. The bill also provides that this exemption is subject to the Open Government Sunset Review Act of 1955 in accordance with s. 119.150, F.S., and will stand repealed on October 2, 2007, unless saved from repeal through reenactment by the Legislature.

The bill further provides for a statement of public necessity which states that the exemption of these workpapers is justified to facilitate the effective and efficient administration of a government program and that disclosure could reveal confidential information that could be used in preparing examination or investigation reports, thus thwarting the integrity of the state's regulatory process. Further, since the confidential workpapers are by their nature inaccurate or incomplete, release of such information could be detrimental to persons and insurers examined or

investigated. Also, disclosure of confidential information would impair the ability of DOI to gather information needed for an investigation or examination because persons who would otherwise provide such information would be unwilling to do so for fear that the information would not remain confidential.

This bill substantially amends section 624.319 of the Florida Statutes.

II. Present Situation:

Constitutional Access to Public Records and Meetings

Article I, s. 24 of the State Constitution provides every person with 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. The section specifically includes the legislative, executive, and judicial branches and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissioners or entities created pursuant to law or the State Constitution.

The State Constitution permits exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide, by general law, for the exemption of records provided that: (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. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

The Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, provides that it is the intent of the Legislature that exemptions are to be created or maintained only if:

1. The exempted record or meeting is of a sensitive, personal nature concerning individuals;
2. The exemption is necessary for the effective and efficient administration of a governmental program; or
3. The exemption affects confidential information concerning an entity.¹

The act also establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years and must state that the exemption must be reviewed by the Legislature before the scheduled repeal date. 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.

¹ While the act purports to limit the bases for which the Legislature may adopt exemptions to public records or meetings requirements, one session of the Legislature may not bind a future session of the Legislature and, as a result, the limited bases established in the act are not exclusive or binding.

In the 5th year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed in October of the 5th year, unless the Legislature acts to reenact the exemption.

Under the requirements of the Open Government Sunset Review Act, an exemption is to be maintained only if: (1) the exempted record or meeting is of a sensitive, personal nature concerning individuals; (2) the exemption is necessary for the effective and efficient administration of a governmental program; or (3) the exemption affects confidential information concerning an entity.

As part of the review process, s. 119.15(4)(a), F.S., requires the consideration of the following specific 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?

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption: (1) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption; (2) 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; 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 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.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. In addition, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Examinations and Investigations by the Department of Insurance

Under present law, the Department of Insurance (DOI) is authorized to conduct examinations of insurers as to transactions, accounts, and records, which relate directly or indirectly to the insurer (s. 624.316, F.S.). Examinations of domestic insurers must be conducted not less frequently than once every 3 years and under certain specified circumstances, once every 5 years. In lieu of making its own examination, the DOI may accept a full report of the last recent examination of a foreign insurer, certified by the insurance official of another state. Examinations of alien insurers are limited to the insurer's insurance transactions in the United States, except as otherwise required by the DOI. The DOI also conducts market conduct investigations relating to insurers as often as it deems necessary (s. 624.3161, F.S.). Market conduct examinations are done for the purpose of ascertaining compliance with applicable provisions of the Insurance Code. Examination reports, until filed, are confidential and exempt from the public records law (s. 624.319, F.S.)

Investigation reports are conducted by the DOI when there is a reasonable, good faith belief that it could lead to the filing of an administrative, civil or criminal investigation. An investigation is considered to be “active” while it is being conducted by the DOI with a reasonable, good faith belief that it could lead to the filing of administrative, civil, or criminal proceedings. After an investigation has been completed or ceases to be active, portions of the investigation report relating to the investigation remain confidential and exempt if release would jeopardize the integrity of another active investigation; impair the safety and financial soundness of the licensee or affiliated party; reveal personal financial information on the identity of a confidential source; defame the good name or reputation of an individual; jeopardize the safety of an individual; or reveal investigative techniques or procedures. Therefore, investigation reports are confidential and exempt, until the investigation has been completed or ceases to be active.

Workpapers or any other information held by the DOI, which may include reports and correspondence from other states or federal regulators, as well as draft reports, notes, analyses, audit programs, or memorandums, are *not exempt* from disclosure under the public records law. Because this information is subject to the public records law, often examiners are unable to obtain confidential information from other states or federal agencies in the performance of examinations or investigations being conducted in this state. Furthermore, according to representatives with DOI, their staff regularly participates in multi-state examinations and investigations when insurers are active across state lines. The absence of workpaper confidentiality impairs the DOI’s ability to fully participate in multi-state examinations and investigations of these companies or officers of such companies.

III. Effect of Proposed Changes:

Public Records/Workpaper Exemption

This bill would create an exemption from the public records law for workpapers and other information held by the Department of Insurance (DOI) in the performance of the department’s examination or investigation duties and would apply to workpapers and information held before, on, or after the effective date of the exemption. The confidential information may be disclosed to another governmental entity, if such disclosure is necessary for the receiving entity to perform its duties and responsibilities and may also be disclosed to the National Association of Insurance Commissioners (NAIC). It mandates that the receiving entity maintain the confidential status of the information.

The bill provides that the confidential information may be used in criminal, civil, or administrative proceedings so long as the confidential status of the information is maintained. According to DOI representatives, the above provisions will greatly facilitate the free exchange of workpapers among the DOI, state and federal regulators, and NAIC.

The provisions of this bill do not change the current law which provides that examination reports issued by DOI are confidential and exempt from the public records law, until filed, and that investigation reports are confidential and exempt, until the investigation has been completed or ceases to be active.

Sunset Review

The bill also provides that this exemption is subject to the Open Government Sunset Review Act of 1955 in accordance with s. 119.150, F.S., and will stand repealed on October 2, 2007, unless saved from repeal through reenactment by the Legislature.

Statement of Public Necessity

The bill further provides for a statement of public necessity which states that the exemption of these workpapers is justified to facilitate the effective and efficient administration of a government program and that disclosure could reveal confidential information that could be used in preparing examination or investigation reports, thus thwarting the integrity of the state's regulatory process. Further, since the confidential workpapers are by their nature inaccurate or incomplete, release of such information could be detrimental to persons and insurers examined or investigated. Also, disclosure of confidential information would impair the ability of DOI to gather information needed for an investigation or examination because persons who would otherwise provide such information would be unwilling to do so for fear that the information would not remain confidential.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The provisions of the bill would protect persons and insurers because examination and investigation work papers are by their nature incomplete or misleading, and could ultimately harm such persons and insurers, if disclosed.

C. Government Sector Impact:

The bill will greatly aid the department in carrying out its examination and investigation functions because the department can share confidential information with governmental

regulators and NAIC. According to officials with the DOI, this legislation conforms Florida law to NAIC's "Financial Regulation Standards and Accreditation Program" which establishes the confidentiality of examination workpapers.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
