

**The Florida Senate**  
**PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT**

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

Prepared By: Governmental Operations Committee

**BILL:** CS/SB 628

**INTRODUCER:** Governmental Operations Committee and Senator Lawson

**SUBJECT:** Public Records and Meetings Exemption; Florida Workers' Compensation JUA

**DATE:** April 12, 2007      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	Fav/CS
2.			JU	
3.			HI	
4.			RC	
5.				
6.				

**I. Summary:**

The bill creates an exemption for certain records and portions of meetings of the Florida Workers' Compensation Joint Underwriting Association, Inc. (JUA), the insurer of last resort for employers who are unable to secure workers' compensation insurance coverage in the voluntary market. The bill makes confidential and exempt underwriting files, claims files until termination of litigation and settlement, audit records, certain proprietary information, medical records, records relative to an employee's participation in an employee assistance program, certain information related to negotiations, reports regarding fraud until the investigation is closed or ceases to be active, and payroll and client lists of employee leasing companies obtained from the Department of Revenue. The bill also makes confidential and exempt a public record prepared by an attorney retained by the association to protect or represent the interests of the association or prepared at the attorney's express direction, that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association. Exceptions are provided. The bill also makes exempt that portion of a meeting at which exempt records are discussed and the minutes of that portion of such meetings. The bill also provides the constitutionally-required statement of public necessity for the exemption. Further, the bill makes the exemption subject to future review and repeal under the Open Government Sunset Review Act in 2012.

Pursuant to s. 24(c), Art. I, of the State Constitution, a two-thirds vote of the members is required for the passage of a newly created public records or public meetings exemption.

This bill creates the following section of the Florida Statutes: 627.3121.

## II. Present Situation:

### Public Records

Florida has a long history of providing public access to government records. In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>1</sup> Article I, s. 24 of the State Constitution, provides that:

(a) Every person<sup>2</sup> 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. . . .

Unless specifically exempted, all agency 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.<sup>3</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>4</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>5</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>6</sup> 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.<sup>7</sup> A bill enacting an exemption<sup>8</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>9</sup> A bill creating an exemption must be passed by a two-thirds vote of both houses.<sup>10</sup>

The Public Records Act<sup>11</sup> 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:

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<sup>1</sup> Article I, s. 24 of the State Constitution.

<sup>2</sup> Section 1.01(3), F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

<sup>3</sup> Section 119.011(11), F.S.

<sup>4</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>5</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>6</sup> Article I, s. 24(c) of the State Constitution.

<sup>7</sup> *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).

<sup>8</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>9</sup> Art. I, s. 24(c) of the State Constitution.

<sup>10</sup> *Ibid.*

<sup>11</sup> Chapter 119, F.S.

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.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.<sup>12</sup> The records custodian must state the basis for the exemption, in writing if requested.<sup>13</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.<sup>14</sup> 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.<sup>15</sup> Further, the confidentiality of that record must be preserved by the statutorily-named entity that is authorized to receive it.<sup>16</sup>

If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>17</sup> For example, active criminal investigative information is exempt pursuant to s. 119.071(2)(c)1., F.S.<sup>18</sup> Nevertheless, a law enforcement agency may release the description of an alleged perpetrator of a crime to the public. That portion of the exempt criminal investigative information would lose its status as exempt upon release to the public. If, however, a law enforcement agency were to provide exempt information to another law enforcement agency, that would not be released to the public and the information would retain its exempt status in the hands of the receiving entity.<sup>19</sup>

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

The Open Government Sunset Review Act<sup>20</sup> (the “act”) 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 Joint Legislative Management Committee 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:

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<sup>12</sup> Section 119.07(1)(b), F.S.

<sup>13</sup> Section 119.07(1)(c) and (d), F.S.

<sup>14</sup> *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5<sup>th</sup> DCA), rev. denied 892 So.2d 1015 (Fla. 2004).

<sup>15</sup> *Ibid* at 53; *see also*, Attorney General Opinion 85-62.

<sup>16</sup> *Ragsdale v. State*, 725 So.2d 203 (Fla. 1998).

<sup>17</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>18</sup> Criminal investigative information is considered “active” as long as it is related to an ongoing investigation which is continuing with a reasonable good faith anticipation of securing an arrest or prosecution in the foreseeable future. In addition, it is considered “active” while it is directly related to pending prosecutions or appeals.

<sup>19</sup> *City of Riviera Beach v. Barfield*, 642 So.2d 1135, 1137 (Fla 4<sup>th</sup> DCA 1994).

<sup>20</sup> Section 119.15, F.S.

- [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.<sup>21</sup>

The act also requires consideration of the following:

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

### **Florida Workers' Compensation Joint Underwriting Association (JUA)**

In 1993, the Legislature created the JUA as a nonprofit, self-funding entity, governed by a nine-member board, to act as an insurer of last resort for employers unable to secure workers' compensation insurance in the voluntary market.<sup>22</sup> The board of this residual market is comprised of three members appointed by the Financial Services Commission; two members representing the top 20 domestic insurers writing workers' compensation; two members representing the top 20 foreign insurers writing workers' compensation; one person appointed by the largest property and casualty insurance agents' association; and the Consumer Advocate for the Department of Financial Services.

### **Applicability of the Public Records Law to Residual Markets**

Historically, the public records law has been held to apply to private entities, including residual markets or joint underwriting associations, created by law or by public agencies, unless specifically exempted by law. Section 119.01, F.S., requires that records made or received in connection with the transaction of official business by an agency must be open for inspection in the absence of a statute exempting the record or making it confidential. The law defines the term, "agency," to include any authority, board, commission, or other separate unit of government, *created or established by law* and any other public or private agency, person, partnership, corporation, or business entity, acting on behalf of any public agency.<sup>23</sup> Section 286.011, F.S.,

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<sup>21</sup> Section 119.15(4) (b), F.S.

<sup>22</sup> Section 627.311(5), F.S.

<sup>23</sup> Section 119.011(2), F.S.

relating to public meetings and records provides that all meetings of any board of any state agency or authority at which official acts are to be taken are open to the public, unless exempted.

The Office of the Attorney General has opined that other joint underwriting associations, such as the former Florida Windstorm Underwriting Association and the Residential Property and Casualty Joint Underwriting Association, are subject to public records laws. The Attorney General's Office has opined that residual markets are "agencies" as defined in ch. 119, F.S., and are accordingly, subject to the provisions of the Government-in-the-Sunshine Law, unless specifically exempted from the provisions.<sup>24</sup>

Consistent with the public record laws, s. 627.311(5)(b), F.S., provides that the minutes, audits, and procedures of the JUA board are subject to ch. 119, F.S. In recent years, representatives of the JUA have contended that the JUA is not statutorily subject to the "Government-in-the-Sunshine" provisions; however, the JUA "has agreed to conduct its meetings in the spirit of those requirements pursuant to regulatory requests."<sup>25</sup> Recently, the Office of Insurance Regulation directed the JUA to amend its plan of operation to provide for meetings noticed in accordance with the Sunshine Laws and to comply promptly with all public record requests unless the information is exempt from the public record laws.<sup>26</sup>

Citizens Property Insurance Corporation, the Florida Automobile Joint Underwriting Association, and the Florida Medical Malpractice Joint Underwriting Association, which operate as residual markets, have public record exemptions created in law. These exemptions include portions of meetings and claims and underwriting records related to ongoing litigation. This type of exemption assists residual markets during the litigation of a claim, since the release of such information could jeopardize or compromise ongoing or pending litigation. Presently, the JUA does not have a statutory exemption from the Public Records Act.

### III. Effect of Proposed Changes:

**Section 1** creates s. 627.3121, F.S., to make the following records and portions of meetings held by the Florida Workers' Compensation Joint Underwriting Association confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution exempt:

- Underwriting files, except that a policyholder or an applicant is authorized access to his or her own underwriting files;
- Claims files until the termination of all litigation and settlement of all claims arising out of the same accident, except that portions of the claims files may remain confidential or exempt if otherwise provided by law;
- 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;
- Proprietary information licensed to the JUA under contract when the contract requires the association to maintain the confidentiality;

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<sup>24</sup> AGO 94-32 and AGO 95-32.

<sup>25</sup> Florida Workers' Compensation Joint Underwriting Association, Inc. Minutes of the Board of Governors Meeting, June 22, 2005.

<sup>26</sup> Letter from Kevin M. McCarty, Commission of the OIR to Laura Torrence, Executive Director of the JUA, October 12, 2005.

- Medical records, which include information relating to the medical condition or medical status of an individual;
- All records relative to the participation of an employee in an employee assistance program, except as otherwise provided in s. 440.102(8);
- Information relating to negotiations for financing, reinsurance, depopulation, or contractual services, until the conclusion of the negotiations;
- Reports regarding suspected fraud or other criminal activity and producer appeals and related reporting regarding suspected misconduct until the investigation is closed or ceases to be active;
- Information secured from the Department of Revenue regarding payroll information and client lists of employee leasing companies authorized under ss. 440.381 and 468.529, F.S;
- A public record prepared by an attorney retained by the association to protect or represent the interests of the association or prepared at the attorney's express direction, that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association.
- That portion of a meeting of the association's board of governors or any subcommittee thereof at which exempt records are discussed; all exempt portions must be recorded and transcribed and preserved for a minimum of 5 years;
- The transcript and minutes of exempt portions of meetings at which confidential and exempt records are discussed until termination of all litigation and settlement of all claims with regard to that claim.

The bill authorizes the release of underwriting files and claims files to a carrier who is considering underwriting a risk insured by the JUA, a producer seeking to place such risk with such a carrier; or another entity seeking to arrange voluntary market coverage, or to another agency in the performance of that agency's duties. The governmental agency receiving such record must maintain the confidentiality and exempt status of the claim file it receives.

The exemption is subject to the Open Government Sunset Review Act and will expire October 2, 2012, unless the Legislature reviews the exemption and saves it from repeal.

**Section 2** provides legislative findings that are necessary to make such records and related meetings of the board of directors or any subcommittee of the board confidential and exempt to prevent the disclosure of detailed information concerning a claim, including medical records and personal and sensitive information related to the medical condition of a claimant or an employee of the JUA, and other records delineated in Section 1 of the bill.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

**Attorney-client communications** - The Public Records Act applies to communications between attorneys and agencies. Only the Legislature can exempt attorney-client communications from the act.<sup>27</sup> Although s. 90.502, F.S., of the Evidence Code establishes an attorney-client privilege for public and private entities, this evidentiary statute does not remove communications between an agency and its attorney from the open inspection requirements of ch. 119, F.S. Further, it has been held that public disclosure of these documents does not violate the public agency's constitutional rights of due process, effective assistance of counsel, freedom of speech, or the jurisdiction of the Supreme Court over the bar. In the absence of an exemption, a work product exemption has been held to be "non-existent."<sup>28</sup>

The Legislature has, however, created an attorney work product exemption. Section 119.071(1)(d)1., F.S., provides:

A public record that was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, *that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and that was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or that was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until the conclusion of the litigation or adversarial administrative proceedings [emphasis added]. . .*

Not all trial preparation materials are public records. Attorney notes from attorneys to themselves are designed for their own personal use in remembering certain things and are preliminary guides intended to aid the attorney when they later formalize knowledge. As such, attorney notes have been held not to meet the definition of public records.<sup>29</sup> Similarly, the Florida Supreme Court has held that outlines, time lines, page notations regarding information in the record, and other similar items in the case file do not fall with the definition of public record (i.e., they do not communicate, perpetuate, or formalize knowledge) and are not subject to disclosure.<sup>30</sup> Interoffice and intraoffice memoranda may constitute public records even though encompassing trial preparation materials.<sup>31</sup>

The Florida Workers' Compensation Joint Underwriting Association, Inc., is an agency for purposes of the Public Records Act. As such, the exemption in s. 119.071(1)(d)1., F.S., would apply. The Legislature has also created an exemption in

<sup>27</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>28</sup> *Edelstein v. Donner*, 450 So.2d 562 (Fla. 3d DCA 1984), *approved* 471 So.2d 26 (Fla. 1985).

<sup>29</sup> *State v. Kokal*, 562 So.2d 324, 327 (Fla. 1990).

<sup>30</sup> *Johnson v. Butterworth*, 713 So.2d 985, 987 (Fla. 1998).

<sup>31</sup> *Coleman v. Austin*, 521 So.2d 247, 248 (Fla. 1<sup>st</sup> DCA 1988).

s. 286.011(8), F.S., for meetings between boards and attorneys. The bill provides the association with greater protection than the standard provided for agencies in s. 119.071(1)(d), F.S.

**C. Trust Funds Restrictions:**

None.

**V. Economic Impact and Fiscal Note:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

## **VIII. Summary of Amendments:**

None.

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This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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