

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB GVOPS 12-11 OGSR Florida Workers' Compensation Joint Underwriting Association, Inc.

SPONSOR(S): Government Operations Subcommittee

TIED BILLS: **IDEN./SIM. BILLS:** SB 2082

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Government Operations Subcommittee		Williamson	Williamson

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

Current law provides a public record exemption for certain records held by the Florida Workers' Compensation Joint Underwriting Association, Inc. (JUA). It also provides a public meeting exemption for that portion of a meeting of the JUA's board of governors, or any subcommittee of the JUA's board, at which confidential and exempt records are discussed. An exempt portion of any meeting may not be off the record.

The bill reenacts the public record and public meeting exemptions, which will repeal on October 2, 2012, if this bill does not become law.

The bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Open Government Sunset Review Act

The Open Government Sunset Review Act¹ sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.² If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created³ then a public necessity statement and a two-thirds vote for passage are not required.

Florida Workers' Compensation Joint Underwriting Association, Inc.

The Florida Workers' Compensation Joint Underwriting Association, Inc. (JUA), created by the Legislature in 1993, is a nonprofit, self-funding entity that is the insurer of last resort for employers who are unable to secure workers' compensation insurance coverage in the voluntary market.⁴ The JUA board consists 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.⁵

Public Record and Public Meeting Exemptions under Review

In 2007, the Legislature created a public record and public meeting exemption for the JUA.⁶

¹ See s. 119.15, F.S.

² Section 24(c), Art. 1 of the State Constitution

³ An example of an exception to a public record exemption would be allowing another agency access to confidential or exempt records.

⁴ Florida Workers' Compensation Joint Underwriting Association, Inc., <http://www.fwcjua.com/> (last visited Feb. 3, 2012).

⁵ Section 627.311(5)(b), F.S.

⁶ Chapter 2007-202, L.O.F.; codified as s. 627.3121, F.S.

The following records held by the JUA are confidential and exempt⁷ from public record requirements:

- Underwriting files, except that a policyholder or an applicant must have access to his or her own files.
- Claims files until termination of all litigation and the settlement of all claims arising out of the same accident, with exceptions.
- Records obtained or generated by an auditor pursuant to a routine audit until the audit is completed or, if the audit is part of an investigation, until the investigation is closed or ceases to be active.⁸
- Proprietary information licensed to the JUA under contract if the contract requires the JUA to maintain the confidentiality of such information.
- Medical records, including information relating to the medical condition or medical status of an individual.
- All records relative to an employee's participation in an employee assistance program, except as otherwise provided.
- Information relating to negotiations for financing, reinsurance, reinsurance commutation agreements, depopulation, or other contractual services until the conclusion of the negotiations.
- Reports provided to or submitted by the JUA regarding suspected fraud or other criminal activity and producer appeals and related reporting regarding suspected misconduct until such investigation is closed or ceases to be active.
- Information received from the Department of Revenue regarding payroll information and client lists of employee leasing companies as authorized in current law.
- A public record prepared by an attorney retained by the JUA to protect or represent the interests of the JUA or prepared at the attorney's express direction, that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the JUA.⁹

Upon written request, the JUA may release confidential and exempt records to another agency in the performance of that agency's official duties and responsibilities.¹⁰ In addition, the JUA may release confidential and exempt underwriting files and claims files to a carrier that is considering underwriting a risk insured by the JUA, a producer seeking to place such a risk with such a carrier, or another entity seeking to arrange voluntary market coverage for association risk.¹¹ Prior to releasing confidential and exempt underwriting files or claims files, the carrier, producer, or other entity must agree in writing, notarized under oath, to maintain the confidential and exempt status of such file until that carrier, producer, or other entity agrees to underwrite the risk or provide voluntary market coverage.¹²

Current law also provides a public meeting exemption for that portion of a meeting of the JUA's board of governors, or any subcommittee of the JUA's board, at which confidential and exempt records are discussed.¹³ All exempt portions of meetings must be recorded and transcribed. The board must record the times of commencement and termination of the meeting, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. An exempt portion of the any meeting may not be off the record.¹⁴ The court reporter's notes of any exempt portion of a meeting must be retained by the JUA for a minimum of five years.¹⁵

⁷ There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (*See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991) If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. (*See* Attorney General Opinion 85-62, August 1, 1985).

⁸ An investigation is considered "active" while the investigation is being conducted with a reasonable, good faith belief that it could lead to the filing of administrative, civil, or criminal proceedings. (Section 627.3121(1)(c), F.S.)

⁹ Section 627.3121(1), F.S.

¹⁰ Section 627.3121(3), F.S.

¹¹ Section 627.3121(2)(a), F.S.

¹² Section 627.3121(2)(b), F.S.

¹³ Section 627.3121(4)(a), F.S.

¹⁴ Section 627.3121(4)(b), F.S.

¹⁵ Section 627.3121(4)(c), F.S.

A transcript and minutes of exempt portions of meetings are confidential and exempt from public record requirements.¹⁶ Those portions of the transcript or the minutes pertaining to confidential and exempt claims files are no longer confidential and exempt upon termination of all litigation with regard to that claim.¹⁷

Pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2012, unless reenacted by the Legislature.

Effect of Bill

The bill removes the repeal date, thereby reenacting the public record and public meeting exemptions for the Florida Workers' Compensation Joint Underwriting Association, Inc. It also removes reference to "medical records" and replaces the term with "medical information" because use of the latter term is more consistent with definitions in other statutory provisions.

B. SECTION DIRECTORY:

Section 1 amends s. 627.3121, F.S., to reenact the public record and public meeting exemptions for the Florida Workers' Compensation Joint Underwriting Association, Inc.

Section 2 provides an effective date of October 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

¹⁶ Section 627.3121(4)(d)1., F.S.

¹⁷ Section 627.3121(4)(d)2., F.S.

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.