

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB IBS 14-02 Public Records and Meetings/Insurance Flood Loss Model

**SPONSOR(S):** Insurance & Banking Subcommittee

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Insurance & Banking Subcommittee	13 Y, 0 N	Reilly	Cooper

### SUMMARY ANALYSIS

The bill is linked with HB 879, which is designed to attract private insurers to write flood insurance in Florida. Among its provisions, HB 879 allows flood losses to be projected by a flood model found acceptable or reliable by the Florida Commission on Hurricane Loss Projection Methodology (Commission). It also requires the Commission to adopt, by July 1, 2016, actuarial methods, principals, standards, models, or output ranges for flood loss to be used in setting rates for personal lines residential flood coverage.

With respect to flood loss models, the bill makes the following confidential and exempt from public disclosure:

- Trade secrets used in designing and constructing a flood loss model and provided by a private company pursuant to s. 627.0628, F.S., to the Commission, the Office of Insurance Regulation, or consumer advocate.
- That portion of a Commission meeting or of a rate proceeding on an insurer's rate filing at which trade secrets used in designing and constructing a flood loss model are discussed. Although such portion of a meeting must be recorded, the recording is confidential and exempt from public disclosure.

Current law provides these exemptions for trade secrets in hurricane loss models under s.627.0628(3), F.S.

The bill provides for repeal of the exemptions on October 2, 2019, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

**Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill creates a new exemption; thus, it requires a two-thirds vote for final passage.**

The bill is effective upon becoming a law if HB 879 or similar legislation introduced during the 2014 Legislative Session is enacted into law. It does not appear to have a fiscal impact on state or local governments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Current Situation

The State of Florida has a long history of providing public access to governmental records and meetings. The Florida Legislature enacted the first public records law in 1892.<sup>1</sup> One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>2</sup> Article I, s. 24, of the State Constitution, provides that:

- (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. 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.

In addition to the State Constitution, the Public Records Act,<sup>3</sup> which pre-dates the State Constitution's public records provisions, specifies conditions under which public access must be provided to records of an agency.<sup>4</sup> 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 copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency records are available for public inspection. The term "public record" is broadly defined to mean:

[A]ll 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>5</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>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>7</sup>

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

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<sup>1</sup> Section 1390, 1391 F.S. (Rev. 1892).

<sup>2</sup> Fla. Const. art. I, s. 24.

<sup>3</sup> Chapter 119, F.S.

<sup>4</sup> 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 including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." The Florida Constitution also establishes a right of access to 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 those records exempted by law or the State Constitution. *See supra* fn. 3.

<sup>5</sup> Section 119.011(12), F.S.

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

<sup>7</sup> *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

the statute.<sup>8</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>9</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>10</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>11</sup> A bill enacting an exemption<sup>12</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>13</sup>

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

The Open Government Sunset Review Act (Act)<sup>14</sup> provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from the Public Records Act or the Public Meetings Law.

The Act states that an exemption may be created, revised, 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.<sup>15</sup> 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 exemption meets the three statutory criteria if it:

- 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 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>16</sup>

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the Act are only statutory, as opposed to constitutional. Accordingly, the standards do not limit the Legislature because one session of the Legislature cannot bind another.<sup>17</sup> The Legislature is only limited in its review process by constitutional requirements.

### **Florida Commission on Hurricane Loss Projection Methodology**

In 1995 the Legislature established the Florida Commission on Hurricane Loss Projection Methodology (Commission) to serve as an independent body within the State Board of Administration.<sup>18</sup> The

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<sup>8</sup> Florida Attorney General Opinion 85-62.

<sup>9</sup> *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991).

<sup>10</sup> *Supra* fn. 1.

<sup>11</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001); *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999).

<sup>12</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>13</sup> *Supra* fn. 1.

<sup>14</sup> Section 119.15, F.S.

<sup>15</sup> Section 119.15(6)(b), F.S.

<sup>16</sup> *Id.*

<sup>17</sup> *Straughn v. Camp*, 293 So. 2d 689, 694 (Fla. 1974).

<sup>18</sup> The Commission is created in s. 627.0628, F.S. This statute also provides the composition and duties of the Commission.

Commission is comprised of 12 members. Members include experts in insurance finance, statistics, computer system design, structural engineering, and meteorology who are full-time faculty members in the State University System, three actuaries, the Executive Director of Citizens Property Insurance Corporation, the senior employee responsible for Florida Hurricane Catastrophe Fund operations, the Insurance Consumer Advocate, and the Director of Emergency Management. The Commission sets standards for hurricane loss projection methodology and examines the methods employed in proprietary hurricane loss models used by private insurers in setting property insurance rates to determine whether they meet the Commission's standards.

The Commission adopts findings on the accuracy or reliability of the methods, standards, principles, models and other means used to project hurricane losses. Only hurricane loss models or methods the Commission deems accurate or reliable can be used by insurers in rate filings to estimate hurricane losses used to set property insurance rates.

### **Hurricane Loss Models and Trade Secrets**

Florida law provides the following public records/public meetings exemptions for trade secrets<sup>19</sup> in hurricane loss models:<sup>20</sup>

- Trade secrets used in designing and constructing a hurricane loss model and provided by a private company pursuant to s. 627.0628, F.S., to the Commission, the Office of Insurance Regulation (OIR), or consumer advocate are confidential and exempt from s. 119.07(1), F.S., and s 24(a), Art. I of the State Constitution.
- That portion of a Commission meeting or of a rate proceeding on an insurer's rate filing at which trade secrets used in designing and constructing a hurricane loss model are discussed is exempt from s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution, but must be recorded. The recording of the closed portion of the meeting is exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

### **Use of Flood Models to Set Flood Rates**

The bill is linked with HB 879, which is designed to attract private insurers to write flood insurance in Florida. To support a flood insurance rate for those filed with and approved by the OIR before use, HB 879 allows flood losses to be projected by a flood model found acceptable or reliable by the Commission. For flood rates not filed with or approved by the OIR, if the OIR examines the rates after use, it will consider whether the insurer's flood rates were set based on flood losses projected by a Commission-approved model. HB 879 also expands the Commission's duties to require the Commission to adopt, by July 1, 2016, actuarial methods, principals, standards, models, or output ranges for flood loss to be used in setting rates for personal lines residential flood coverage. This is consistent with the Commission's duties relating to hurricane loss.

### **Effect of the Bill**

The bill extends the exemptions for trade secrets in hurricane loss models set forth previously in the section entitled "Hurricane Loss Models and Trade Secrets" to trade secrets in flood loss models. Specifically, the following is made confidential and exempt from public disclosure:

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<sup>19</sup> Section 688.002, F.S., defines a trade secret as information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

<sup>20</sup> See ch. 2005-264, L.O.F.; s. 627.0628(3)(f), F.S.

- Trade secrets used in designing and constructing a flood loss model and provided by a private company pursuant to s. 627.0628, F.S., to the Commission, OIR, or consumer advocate are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.
- That portion of a Commission meeting or of a rate proceeding on an insurer's rate filing at which trade secrets used in designing and constructing a flood loss model are discussed is exempt from s. 286.011, F.S., and s. 24(b), Art. I of the State Constitution, but must be recorded. The recording of the closed portion of the meeting is exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

The bill provides for repeal of the exemptions on October 2, 2019, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

**B. SECTION DIRECTORY:**

**Section 1.** Amends s. 627.0628, F.S., relating to the Florida Commission on Hurricane Loss Methodology; public records exemption; public meetings exemption. .

**Section 2.** Sets forth legislative findings that the newly created public records exemptions and public meeting exemption for trade secrets in flood loss models are a public necessity.

**Section 3.** Provides for the bill to take effect upon becoming a law if HB 879 or similar legislation is adopted during the 2014 Legislative Session.

## **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:**

The bill should benefit consumers because it will facilitate the development of flood loss models which will be used by insurers to offer flood insurance policies that may ultimately compete in price and coverage options with the National Flood Insurance Program.

**D. FISCAL COMMENTS:**

None.

## **III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or, reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.