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Committee on Banking and Insurance

OPEN GOVERNMENT SUNSET REVIEW OF SECTION 627.06292, F.S., REPORTS OF HURRICANE LOSS AND ASSOCIATED EXPOSURE DATA UTILIZED FOR THE DEVELOPMENT OF THE PUBLIC HURRICANE LOSS PROJECTION MODEL

Issue Description

The need to predict hurricane losses for an estimated \$1.5 trillion worth of structures exposed to potential hurricane devastation in Florida prompted the Legislature to fund the development of a public hurricane loss projection model (public model). In 2000, the Legislature funded the public model at Florida International University (FIU) so that it could be used to assess hurricane risks and project annual expected insured losses for personal residential properties.¹ Another purpose in developing the model was to allow the Office of Insurance Regulation (OIR) to use it as a baseline for comparison to the private hurricane loss projection models used by property insurers in their rate filings.² Over the past 9 years, the Legislature has appropriated \$7.5 million for the development and maintenance of the public model.

Section 627.06292, F.S., exempts from the public records requirements reports by insurance companies of their hurricane loss and associated exposure data which is provided to FIU on an annual basis for the development and maintenance of the public model. The hurricane loss and exposure information contains the following data fields: type, age, wind mitigation features, and location of each insured property; the amount and type of coverage written on each of those properties; the amount, date, and type of damage paid for by the insurer on each property; and the amount of reserves held by an insurer for future payments or expenses on damages associated with the date or dates of occurrence of hurricanes. This insurance data is critical to the continued operation and viability of the public model since it must be updated on a yearly basis.³

The Open Government Sunset Review Act under s. 119.15, F.S., provides for the review of public records exemptions 5 years after enactment. Section 627.06292, F.S., will be repealed on October 2, 2010, unless reviewed and saved from repeal through reenactment by the Legislature.

Senate Banking and Insurance professional staff recommends that the current exemption should be reenacted and saved from repeal with the following change: require FIU to analyze and annually publish all insurer hurricane loss and exposure data by county according to the data fields outlined above. The report should aggregate all insurer information so that the identity of the insurer and policyholder is kept confidential. This report would be a valuable tool for policymakers in understanding the types of structures, insurance coverages, mitigation features, and hurricane-related damages in each of Florida's 67 counties.

¹ The proviso language stated that the public model would determine hurricane risks and projected losses to "guarantee appropriate insurance rate regulation." The public model is currently limited to the analysis of single-family homes, including manufactured houses. However, FIU is in the process of modifying the model to include commercial residential buildings.

² Insurers utilize private models in determining homeowner's windstorm rates.

³ However, on September 17, 2009, the Florida Commission on Hurricane Loss Projection Methodology voted to certify models (both private and the public model) on a biennial rather than an annual basis pursuant to the statutory directive in Ch. 2009-70, L.O.F.

Background

Public Records

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.⁴ 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.⁵ 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,⁶ which pre-dates public records provision of the State Constitution, specifies conditions under which public access must be provided to records of an agency.⁷ 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 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.⁸

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.⁹ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.¹⁰

Only the Legislature is authorized to create exemptions to open government requirements.¹¹ 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.¹² A bill enacting an

⁴ Section 1390, 1391 F.S. (Rev. 1892).

⁵ Article I, s. 24 of the State Constitution.

⁶ Chapter 119, F.S.

⁷ 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.

⁸ Section 119.011(11), F.S.

⁹ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

¹⁰ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

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

¹² *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).

exemption¹³ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.¹⁴

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.¹⁵ If a record is simply made exempt from disclosure requirements an agency is not prohibited from disclosing the record in all circumstances.¹⁶

The Open Government Sunset Review Act¹⁷ provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the Public Records Act or the Public

Meetings Law. 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 exemption meets the three statutory criteria if it:

- (1) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- (2) protects 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
- (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 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.¹⁸

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 so, 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?

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 that are only statutory, as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.¹⁹ The Legislature is only limited in its review process by constitutional requirements.

¹³ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹⁴ Art. I, s. 24(c) of the State Constitution.

¹⁵ Attorney General Opinion 85-62.

¹⁶ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

¹⁷ Section 119.15, F.S.

¹⁸ Section 119.15(4)(b), F.S.

¹⁹ *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

Further, s. 119.15(4) (e), F.S., makes explicit that:

... notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

Florida Public Hurricane Loss Projection Model

The Florida Legislature authorized and funded the development of the public hurricane loss projection model pursuant to the 2000 General Appropriations Act.²⁰ The model was required to be designed in accordance with the standards set by the Florida Commission on Hurricane Loss Projection Methodology (commission).²¹ The Department of Insurance²² was initially appropriated \$2.5 million to contract with the State University System, which contract was entered into with the International Hurricane Research Center at Florida International University (FIU).²³ Subsequent appropriations of approximately \$600,000 per year have been made to further the development of the public model at a total cost of \$7.5 million over the 9 year period. The public model was certified by the commission as acceptable in 2007 and has been certified each year thereafter.²⁴

The primary purposes in developing the public model were to assess hurricane risks, to project annual expected insured losses for personal residential properties, and to allow the OIR to use it as a baseline for comparison to the private hurricane loss projection models utilized by insurers when the OIR reviews insurer rate filings.²⁵ The public model can provide a check on the assumptions, analyses, and results generated by the proprietary models. The public model, as opposed to private models, is also transparent in that its assumptions, methodologies, designs, and theories are open to the public. It must be periodically updated as new meteorological and insurance claims data become available and as new scientific methodologies are available, otherwise the model will become obsolete.

In general, all hurricane loss projection models consist of a very complex set of computer programs which estimate loss costs and probable maximum loss levels from hurricane events for residential properties. These programs simulate and predict how, where and when hurricanes form, their wind speeds, intensities and sizes, how they are affected by the terrain, how much they can damage structures, how much it will cost to rebuild such structures, and how much of the loss will be paid by insurers. Such models can then generate, for a given policy or portfolio of residential policies, the annual average losses and the probable maximum losses.

Florida Commission on Hurricane Loss Projection Methodology

In 1995, the Florida Legislature established the commission under s. 627.0628, F.S., to serve as an independent body within the State Board of Administration. Its members include experts in insurance finance, statistics, computer system design, and meteorology. The commission's role is to adopt findings relating to the accuracy or reliability of the methods, standards, principles, models, and other means used to project hurricane losses. The commission sets standards for loss projection methodology and examines the methods employed in hurricane loss models (both the public model and private models) used by insurers in setting rates to determine whether they meet the commission standards. The law provides that an insurer may use in its rate filing hurricane loss models found by the commission to be accurate or reliable and that such findings are admissible and relevant in

²⁰ Section 6 (2226) of ch. 2000-166, L.O.F.

²¹ Section 627.0628, F.S.

²² Now referred to as the Office of Insurance Regulation.

²³ FIU has utilized experts in various fields from other universities and multiple organizations in the research and development of the public model.

²⁴ The commission found the public hurricane loss model in compliance with its standards on August 17, 2007.

²⁵ Legislation enacted in 2008 requires insurers to use a model (for the purposes of a rate filing) found to be accurate or reliable by the commission. The legislation also allows property insurers to use the public model for the purpose of calculating rate indications in a rate filing and for analytical purposes, but must pay for the use of the public model (Ch. 2008-66, L.O.F.). Citizens Property Insurance Corp. must use the public model which serves as a minimum benchmark for determining the windstorm portion of its rates (s. 627.315, F.S.).

consideration of the rate filing by OIR. There are four private models that have been certified by the commission: AIR Worldwide, Atlantic Tropical Cyclone Model V11.0; Applied Research Associates, HurLoss Version 4.2.a; EQECAT, Florida Hurricane Model 2009; and Risk Management Solutions, RiskLink Version 8.0.1a.

Exemption Under Review

In 2005, the Legislature mandated insurance companies provide reports of “hurricane loss data and associated exposure data” to the OIR or to a center at a state university (FIU) for developing, maintaining, and updating the public model for hurricane loss projections.²⁶ Such data was critical for the development, accuracy, and validation of the model. Passage of this legislation was necessary because the process of developing and testing the public model had been slowed by the failure of some insurers to provide this information.²⁷ A separate bill was also enacted in 2005 creating a public records exemption to protect the confidentiality of this information.²⁸ Hurricane loss and associated exposure data are defined to mean the type, age, wind mitigation features, and location of each property insured; the amount and type of coverage written on each of those properties; the amount, date, and type of damage paid for by the insurer on each property; and the amount of reserves held by an insurer for future payments or expenses on damages associated with the date or dates of occurrence of hurricanes.

The public necessity statement accompanying this exemption provided that revealing an insurer’s hurricane loss and exposure information on a per policy basis would substantially harm a company in the insurance market and give competing insurers an unfair economic advantage. The statement also noted that the information concerning the hurricane losses that are paid by an insurer for specific types and locations of homes is proprietary in nature and such data could be used by a competitor to solicit business by offering lower prices based on the information gathered.

Findings and/or Conclusions

Reports of Insurer Hurricane Loss and Associated Exposure Data

The Open Government Sunset Review Act requires consideration of a number of questions in the performance of a review under the act.²⁹ As part of the review process, Senate professional staff surveyed representatives of the Office of Insurance Regulation, Florida International University, insurance companies, and the First Amendment Foundation.

What specific records or meetings are affected by the exemption?

The records affected are insurer exposure data for each residential policyholder which includes the following data fields: policy ID number; geographic location of residence (zip code, county, and territory); construction type (frame, masonry, manufactured, or other); year built; property value; coverage amounts for the structure, contents, appurtenant structures, and ALE (additional living expenses); non-hurricane deductible; hurricane deductible; nature of coverage (replacement cost or actual cash value); and policy form type. According to representatives with FIU, this data is used to “operate the public model” and must be submitted annually to the OIR which forwards it to FIU.

In addition, insurers must submit policy claim and exposure data after a hurricane which is used to validate and calibrate the public model, according to these representatives. These data fields include hurricane losses (amount of wind losses paid for the structure, contents, appurtenant structures and ALE and applicable limits of insurance on same); deductible amounts applicable to hurricane losses and non-hurricane losses; roof type; building code enforcement; and specifics about the hurricane.³⁰

Whom does the exemption uniquely affect, as opposed to the general public?

²⁶ Chapter 2005-111, L.O.F., creating s. 627.06281, F.S.

²⁷ See Senate Staff Analysis and Economic Impact Statement, April 26, 2005.

²⁸ Chapter 2005-264, L.O.F., creating s. 627.06292, F.S.

²⁹ Section 119.15(6)(a), F.S.

³⁰ The OIR plans to request specific information as to wind mitigation features when it sends out its next claim and exposure data request for the 2005 hurricane season.

The exemption affects property insurance companies that submit their hurricane loss and exposure data for development/maintenance of the public model and their policyholders. Insurers consider the exempt data proprietary and a trade secret and such data is critically valuable to their respective companies. The exemption impacts the viability of the public model because it could not be maintained, calibrated or validated without insurer loss and exposure data and thus would not be certified by the commission. The exemption further impacts the OIR because, without the exemption, it would not be able to utilize the public model in reviewing and evaluating rate filings.

What is the identifiable public purpose or goal of the exemption?

Representatives with the OIR and FIU state that the exemption furthers the State's interest in stabilizing the residential property insurance market through the use of the public model. To that end, the exemption seeks to protect insurer loss and exposure information which supports the viability of the model. The statement of public necessity for the exemption notes that revealing insurer data would harm a company and give competitors an unfair competitive and economic advantage. Insurers would be unwilling to provide such information without the exemption.

Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Representatives with insurers, the OIR, and FIU state that the insurer information could not be obtained by alternative means.

Is the record or meeting protected by another exemption?

If an insurer can establish that its hurricane loss and exposure data is protected under the general public records exemption for trade secrets, then such information may be protected. The trade secret exemption is provided under s. 815.045, F.S., as interpreted by the Florida First District Court of Appeal in *Sepro Corp. v. Fla. Dept. of Environmental Protection*.³¹ However, officials with insurance companies assert that the question of whether this data constitutes a trade secret would be subject to protracted litigation, thus delaying its submission for the public model. For example, current public record inquiries to the OIR require the agency to notify the insurer that it has 30 days after receipt of the notice to file an action in circuit court seeking determination whether the document in question is a trade secret and an order barring public disclosure of the document (s. 624.4213, F.S.).

Insurance officials also argue that it would not have been necessary to enact the current exemption if it was established that insurer loss and exposure information was already protected under the trade secret exemption.

Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

No.

Options and/or Recommendations

Senate Banking and Insurance professional staff recommend that the current exemption should be reenacted and saved from repeal with the following change: require FIU to analyze and publish on an annual basis all insurer hurricane loss and exposure data by county according to the data fields outlined above. The report should

³¹ 911 So.2d 792 (Fla. 1st DCA, 2003). In *Sepro*, the court determined that s. 815.045, F.S., provides a public records exemption for all trade secrets as defined in s. 812.081(1)(c), F.S. "Trade secret" means the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. "Trade secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be: 1. secret; 2. of value; 3. for use or in use by the business; and 4. of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

aggregate all insurer data so that the identity of the insurer and policyholder is kept confidential. This report would be a valuable tool for policymakers in understanding the types of structures, mitigation features, insurance coverages, and hurricane-related damages in each of Florida's 67 counties.

Representatives with the OIR, FIU, and property insurers support this recommendation. Retaining the exemption and protecting insurer loss and exposure information is critical for the operation, validation, and calibration of the public model. As explained above, the model is necessary to determine hurricane risks and project annual expected insured losses for residential properties in Florida as well as provide the OIR with an invaluable tool in reviewing insurer rate filings. Office of Insurance Regulation and Florida International University officials express concern that insurers would not submit their data and the viability of the public model would be jeopardized if the exemption were to be repealed.

Representatives with the First Amendment Foundation (Foundation) recommend eliminating the exemption by allowing all insurer loss and exposure data to become public, but authorize the OIR and FIU to redact any information pertaining to the identity of the insurer and policyholder. Representatives with the Foundation recommend this option so as to further the public's right to examine this information. However, officials with the OIR and FIU strongly oppose this suggestion because it would require substantial resources, involve the production of millions of individual sets of data, and produce a product that would have little if any meaningful or educational value to the public. A statewide list of randomized data fields that are not identified by location is not as informative as an annual report issued by FIU analyzing all data fields by county. For example, the report could provide a valuable profile (e.g., the type of construction, age and mitigation features of structures) of the housing stock in a particular county. In order to accomplish the recommendation by the Foundation, millions of redactions would be necessary to produce a statewide randomized list of data fields, new computer programs developed, software purchased, and extra staff needed to carry out public records requests, according to these officials. Both FIU and OIR request an appropriation of \$115,000 for two FTEs and for computer related purchases to accomplish this option.