

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 981 Pub. Rec./Department of Elderly Affairs

**SPONSOR(S):** Health & Human Services Committee, Children, Families & Seniors Subcommittee, Gonzalez

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1408

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	10 Y, 0 N, As CS	Langston	Brazzell
2) Oversight, Transparency & Administration Subcommittee	14 Y, 0 N	Whittaker	Harrington
3) Health & Human Services Committee	14 Y, 1 N, As CS	Langston	Calamas

### SUMMARY ANALYSIS

The Office of Public and Professional Guardians must review and, if legally sufficient, investigate, any complaint that a professional guardian has violated the standards of practice established by the office. From March 10, 2016 to March 9, 2017, the Office of Public and Professional Guardians received 125 complaints about public and professional guardians.

The bill makes confidential and exempt from Florida's public record laws the personal identifying information of a person filing a formal administrative complaint, the personal identifying information of a ward, all personal health and financial records of a ward, and all photographs and video recordings, when such records or information is held by the Department of Elderly Affairs (Department) in connection with a complaint filed under part II of chapter 744, F.S. The bill provides that the Department may provide the protected records to any law enforcement agency, any other regulatory agency in the performance of its official duties and responsibilities, or the clerk of the circuit court when reviewing an initial or annual guardianship report. The exemption is retroactive and applies to all documents received by the Department in connection with a complaint before, on, or after July 1, 2017.

The exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2022, unless reviewed and saved from repeal by the Legislature.

The bill also provides a statement of public necessity as required by the Florida Constitution.

The bill may have an insignificant negative fiscal impact on the state and does not appear to have a fiscal impact on local governments.

The bill provides that the act will take effect July 1, 2017.

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

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

##### Public Records Laws

Article I, section 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, section 24(a) of the Florida Constitution.<sup>1</sup> The general law must state with specificity the public necessity justifying the exemption<sup>2</sup> and must be no more broad than necessary to accomplish its purpose.<sup>3</sup>

Public policy regarding access to government records is addressed further in s. 119.07(1)(a), F.S., which guarantees every person a right to inspect and copy any state, county, or municipal record. If a record is exempt, the specified record or meeting, or portion thereof, is not subject to the access requirements of s. 119.07(1), F.S., s. 286.011, F.S., or article I, section 24 of the Florida Constitution. If records are only exempt from the Public Records Act and not confidential, the exemption does not prohibit the showing of such information, but simply exempts them from the mandatory disclosure requirements in section 119.07(1)(a), F.S.

Furthermore, the Open Government Sunset Review Act<sup>4</sup> (Act) provides that a public records exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no more broad than necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect 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.
- Protect trade or business secrets.<sup>5</sup>

During the legislative review process, the following questions must be considered about the exemption:

- What specific records or meetings are affected by the exemption?
- What specific parties does the exemption affect?
- What is the public purpose of the exemption?
- Can the information contained in the records or meetings be readily obtained by alternative means? If so, 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?<sup>6</sup>

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<sup>1</sup> FLA. CONST. art. I, s. 24(c).

<sup>2</sup> This portion of a public records exemption is commonly referred to as a "public necessity statement."

<sup>3</sup> FLA. CONST. art. I, s. 24(c).

<sup>4</sup> Section 119.15, F.S.

<sup>5</sup> Section 119.15(6)(b), F.S.

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

The Act also requires the automatic repeal of a public record exemption on October 2nd of the fifth year after its creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>7</sup>

## Public and Professional Guardians

Guardianship is a concept whereby a “guardian” acts for another, called a “ward,” whom the law regards as incapable of managing his or her own affairs due to age or incapacity.<sup>8</sup> There are two main forms of guardianship: guardianship over the person or guardianship over the property, which may be limited or plenary.<sup>9</sup> For adults, a guardianship may be established when a person has demonstrated that he or she is unable to manage his or her own affairs. If the adult is competent, this can be accomplished voluntarily. However, when an individual’s mental competence is in question, an involuntary guardianship may be established through the adjudication of incompetence which is determined by a court appointed examination committee.<sup>10</sup> A person serving as a public guardian is considered a professional guardian for purposes of regulation, education, and registration.<sup>11</sup>

### *Regulation of Public and Professional Guardians*

The Legislature created the Statewide Public Guardianship Office in 1999 to provide oversight for all public guardians.<sup>12</sup> In 2016, the Legislature renamed the Statewide Public Guardianship Office within the Department of Elder Affairs (Department) as the Office of Public and Professional Guardians (Office) and expanded the Office’s responsibilities.<sup>13</sup> The expansion of the Office’s oversight of professional guardians followed reports of abuse and inappropriate behavior by professional guardians.<sup>14</sup> The Office now regulates professional guardians with certain disciplinary and enforcement powers.<sup>15</sup> Specifically, s. 744.2004, F.S., requires the Office to review and, if determined legally sufficient, investigate any complaint that a professional guardian has violated the standards of practice established by the Office. There are currently 17 public guardian offices throughout the state and 514 professional guardians registered with the Office.<sup>16</sup> According to the Department, between March 10, 2016 and March 9, 2017, there have been 125 complaints filed against public and professional guardians.<sup>17</sup> The Office has received one public records request relating to such complaints.<sup>18</sup>

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<sup>7</sup> Section 119.15(3), F.S.

<sup>8</sup> Section 744.102(9), F.S.

<sup>9</sup> Section 744.2005, F.S.

<sup>10</sup> Section 744.102(12), F.S.

<sup>11</sup> Section 744.102(17), F.S.

<sup>12</sup> Chapter 99-277 L.O.F.

<sup>13</sup> See CS/CS/CS/SB 232 (2016) and ch. 2016-40, L.O.F.

<sup>14</sup> See, e.g., Florida Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, 2003, *available at* <http://flcourts.org/core/fileparse.php/260/urlt/guardianshipmonitoring.pdf> (last visited March 20, 2017) (reviewed how effectively guardians were fulfilling their duties and obligations. The committee received input from citizens that there was abuse, neglect, and misuse of ward’s funds. As a result, the committee stated that, though the majority of guardians are law-abiding and are diligently fulfilling their complex responsibilities, a small percentage are not properly handling guardianship matters, and as a result, monitoring is necessary.); Department of Elder Affairs, Guardianship Task Force – 2004 Final Report, *available at* <http://www.flcourts.org/core/fileparse.php/539/urlt/2004-Guardianship-Task-Force-Final-Report.pdf> (last visited March 20, 2017) (advocated for additional oversight of professional guardians); Michael E. Miller, *Florida’s Guardians Often Exploit the Vulnerable Residents They’re Supposed to Protect*, MIAMI NEWTIMES, May 8, 2014, *available at* <http://www.miamiherald.com/2014-05-08/news/florida-guardian-elderly-fraud/full/> (last visited March 20, 2017) (provided anecdotal evidence of fraud within the guardianship system, noting that the appointed court monitor for Broward County has uncovered hundreds of thousands of dollars that guardians have misappropriated from their wards, and, over the course of two years, Palm Beach County’s guardianship fraud hotline has investigated over 100 cases; and Barbara Peters Smith, *the Kindness of Strangers – Inside Elder Guardianship in Florida*, SARASOTA HERALD-TRIBUNE, December 6, 2014, *available at* <http://guardianship.heraldtribune.com> (last visited March 20, 2017) (three-part series published in December 2014 details abuses occurring in guardianships based on an evaluation of guardianship court case files and interviews with wards, family and friends caught in the system against their will.).

<sup>15</sup> Section 744.2004, F.S.

<sup>16</sup> Department of Elder Affairs; 2017 Agency Legislative Bill Analysis for HB 981; February 28, 2017; on file with the Children, Families & Seniors Subcommittee.

<sup>17</sup> Email received by professional staff from the Department of Elderly Affairs on March 9, 2017.

## Confidentiality of Records Held by the Office of Public and Professional Guardians

Section 744.2104, F.S., requires any medical, financial, or mental health records held by an agency, or the court and its agencies, or financial audits of guardianship records prepared by the clerk of the court to be provided to the Office upon its request, if such records or financial audits are necessary to investigate a guardian as a result of a complaint filed with the Office, to evaluate the public guardianship system, to assess the need for additional public guardianship, or to develop required reports. Any confidential or exempt information provided to the Office must continue to be held confidential or exempt as otherwise provided by law.

All records held by the Office relating to the medical, financial, or mental health of vulnerable adults,<sup>19</sup> persons with a developmental disability,<sup>20</sup> or persons with a mental illness,<sup>21</sup> are confidential and exempt from s. 119.07(1), F.S., and Article I, section 24(a) of the State Constitution.<sup>22</sup>

### Effect of the Bill

The bill makes confidential and exempt<sup>23</sup> from Florida's public record laws the personal identifying information of a person filing a formal administrative complaint, the personal identifying information of a ward, all personal health and financial records of a ward, and all photographs and video recordings, when such records or information is held by the Department in connection with a complaint filed under part II of chapter 744, F.S.

The bill provides that the Department may provide the protected records to any law enforcement agency, any other regulatory agency in the performance of its official duties and responsibilities, or the clerk of circuit court when reviewing an initial or annual guardianship report. The exemption applies to any records received by the department regardless of the date they were received.

The bill includes a public necessity statement, whereby the Legislature finds that it is necessary to exempt information about a complainant and ward held by the Department, which is related to a complaint or obtained during an investigation of a professional guardian, to prevent unwarranted damage to the reputation of the complainant or ward and to protect the safety of such individuals from retaliation. Furthermore, the bill provides that it is necessary to exempt such information, because the release of the information could obstruct an investigation and impair the ability of the Department to effectively and efficiently administer the Office or impair the ability of a law enforcement agency, regulatory agency in the performance of its official duties and responsibilities, or the clerk of circuit court to carry out their statutory duties.

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<sup>18</sup> Id.

<sup>19</sup> "Vulnerable adult" is defined as a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging. Section 415.102(28), F.S.

<sup>20</sup> "Developmental disability" is defined as a disorder or syndrome that is attributable to intellectual disability, cerebral palsy, autism, spina bifida, Down syndrome, Phelan-McDermid syndrome, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely. Section 393.063(12), F.S.

<sup>21</sup> "Mental illness" is defined as an impairment of the mental or emotional processes that exercise conscious control of one's actions or of the ability to perceive or understand reality, which impairment substantially interferes with the person's ability to meet the ordinary demands of living. The term does not include a developmental disability as defined in chapter 393, intoxication, or conditions manifested only by antisocial behavior or substance abuse. Section 394.455(28), F.S.

<sup>22</sup> Section 744.2104(2), F.S.

<sup>23</sup> There is a difference between records the Legislature designates exempt from public records requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991) *review denied*, 589 So. 2d 289 (Fla. 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 statute. See *WFTV, Inc. v. Sch. Bd. of Seminole Cnty*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004); Op. Att'y Gen. Fla. 85-692 (1985).

The bill provides that the public records exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2022, unless saved from repeal by reenactment by the Legislature.

The bill provides an effective date of July 1, 2017.

**B. SECTION DIRECTORY:**

**Section 1.** Creates s. 744.211, F.S., relating to confidentiality.

**Section 2.** Provides a public necessity statement.

**Section 3.** Provides an effective date of July 1, 2017.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

The bill may create a minimal fiscal impact on the Department because staff responsible for complying with public record requests could require training related to the creation of the public record exemption. In addition, the Department could incur costs associated with redacting the exempt information prior to releasing the record. Such costs should be absorbed as they are part of the day-to-day operation of the agency.

## **III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Vote Requirement:

Article I, section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public records or public meetings exemption. The bill creates a public record exemption; therefore, it requires a two-thirds vote for final passage.

Public Necessity Statement:

Article I, section 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; and accordingly, it includes a public necessity statement.

Breadth of Exemption:

Article I, section 24(c) of the Florida Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill protects certain identifying information, health and financial information, and photographs and recordings of complainants and wards in connection with a complaint filed with the Department. The bill provides that releasing such information could cause unwarranted damage to the reputation of the individual and jeopardize the safety of such individuals. In addition, releasing such information may jeopardize investigations of the agency. As such, it does not appear to be in conflict with the constitutional requirement that an exemption be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 13, 2017, the Children, Families, and Seniors Subcommittee adopted an amendment that provides for retroactive applicability of the public records exemption to records held by the department prior to the effective date of the bill. The bill now exempts records held by the department prior to as well as on and after the bill's effective date. The bill was reported favorably as a committee substitute.

On April 6, 2017, the Health and Human Services Committee adopted an amendment that changed "name and identity" to "personal identifying information" for complainants and wards. The bill now exempts additional identifying information of complainants and wards. The bill was reported favorably as a committee substitute. This analysis is drafted to the committee substitute as passed by the Health and Human Services Committee.