

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Rules

BILL: CS/CS/CS/SB 268

INTRODUCER: Rules Committee; Governmental Oversight and Accountability Committee; Children, Families, and Elder Affairs Committee; and Senator Passidomo

SUBJECT: Public Records/Public Guardians/Employees with Fiduciary Responsibility

DATE: February 2, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Preston</u>	<u>Hendon</u>	<u>CF</u>	<u>Fav/CS</u>
2.	<u>Brown</u>	<u>Caldwell</u>	<u>GO</u>	<u>Fav/CS</u>
3.	<u>Preston</u>	<u>Phelps</u>	<u>RC</u>	<u>Fav/CS</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/CS/SB 268 creates a public records exemption for identifying and location information of current and former public guardians, employees with fiduciary responsibility, and their spouses and children.

The required public necessity statement of the bill provides as justification for the exemption that the release of this information may and has placed current and former public guardians, employees with fiduciary responsibility, and the families of these individuals in danger of physical and emotional harm from disgruntled individuals, including wards of the guardian.

The exemption stands repealed on October 2, 2023, pursuant to the Open Government Sunset Review Act, unless the Legislature reviews and reenacts the exemption before that date.

The bill requires a two-thirds vote from each chamber for passage.

The bill takes effect July 1, 2018, but applies retroactively to information protected in this bill which is held by any agency before the effective date.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ This applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.²

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁴ The Public Records Act states that

it is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁵

An agency is defined as 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 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 a public agency.⁶

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁷ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”⁸ A violation of the Public Records Act may result in civil or criminal liability.⁹

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(a).

³ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are primarily located in s. 11.0431(2)-(3), F.S.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ Section 119.011(2), F.S.

⁷ Section 119.011(12), F.S., defines “public record” 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.” Section 119.011(2), F.S., defines “agency” as “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.”

⁸ *Shevin v. Byron, Harless, Schaffer, Reid, and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁹ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

The Legislature may create an exemption to open meetings requirements by passing a general law by a two-thirds vote of the House of Representatives and the Senate.¹⁰ The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the exemption.¹¹ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.¹²

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹³ Records designated as ‘confidential and exempt’ may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as ‘exempt’ may be released at the discretion of the records custodian under certain circumstances.¹⁴

Open Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the “OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁵ The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹⁶ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.¹⁷ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;¹⁸

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ FLA. CONST., art. I, s. 24(c).

¹² *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

¹³ If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

¹⁴ A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁵ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S.

¹⁶ Section 119.15(3), F.S.

¹⁷ Section 119.15(6)(b), F.S.

¹⁸ Section 119.15(6)(b)1., F.S.

- Releasing sensitive personal information would be defamatory or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;¹⁹ or
- It protects trade or business secrets.²⁰

The OGSR also requires specified questions to be considered during the review process.²¹ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²² If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.²³

Guardianship

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. Guardianships are generally disfavored due to the loss of individual civil rights, and a guardian may be appointed only if the court finds there is no sufficient alternative to guardianship.

There are two main forms of guardianship: guardianship over the person or guardianship over the property, which may be limited or plenary.²⁴ A court appoints a limited guardian for a ward who lacks capacity to do some, but not all, of the tasks necessary to care for him or herself or his or her property. In contrast, the court appoints a plenary guardian in instances in which the ward lacks capacity to perform all tasks needed to care for him or herself or his or her property.

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, in situations in which an individual's mental competence is in question, an involuntary guardianship may be established through the adjudication of incapacity which is based on the determination of a court appointed examination committee.²⁵

¹⁹ Section 119.15(6)(b)2., F.S.

²⁰ Section 119.15(6)(b)3., F.S.

²¹ Section 119.15(6)(a), F.S. The specified questions are:

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?

²² FLA. CONST. art. I, s. 24(c).

²³ Section 119.15(7), F.S.

²⁴ Section 744.102(9)(a) and (b), F.S.

²⁵ Sections 744.102(12), 744.3201, 744.341, F.S.

Florida courts have long recognized the relationship between a guardian and his or her ward as a classic fiduciary relationship.²⁶ A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of that relationship.²⁷ The most basic duty of a fiduciary is the duty of loyalty: a fiduciary must refrain from self-dealing, must not take unfair advantage of the ward, must act in the best interest of the ward, and must disclose material facts.²⁸ In addition to the duty of loyalty, a fiduciary also owes a duty of care to carry out its responsibilities in an informed and considered manner.

Section 744.361, F.S., imposes specific duties upon a guardian consistent with the basic duties of a fiduciary including protecting and preserving the property of the ward. A guardian must file with the court an initial guardianship report,²⁹ an annual guardianship report,³⁰ and an annual accounting of the ward's financial activities, accounts and property.³¹ The reports provide evidence of the guardian's faithful execution of his or her fiduciary duties.³²

At the heart of a court's interpretation of a fiduciary relationship is a concern that persons who assume trustee-like positions with discretionary power over the interests of others might breach their duties and abuse their position. Section 744.446(1), F.S., explicitly states that the "fiduciary relationship which exists between the guardian and the ward may not be used for the private gain of the guardian other than the remuneration for fees and expenses provided by law." If a guardian breaches his or her fiduciary duty, a court will intervene and "take the necessary actions to protect the ward and the ward's assets."³³

Office of the Public and Professional Guardians

The Legislature created the Statewide Public Guardianship Office in 1999 to provide oversight for all public guardians.³⁴ The Statewide Public Guardianship Office was renamed the Office of the Public and Professional Guardians in 2016.³⁵ A public guardian may serve "an incapacitated person if there is no family member or friend, other person, bank, or corporation willing and qualified to serve as guardian."³⁶ A person serving as a public guardian is considered a professional guardian for purposes of regulation, education, and registration.³⁷ A public guardian may be an appointee of the Office of the Public and Professional Guardians or a contract employee of a nonprofit corporation.³⁸ Public guardianship offices are located in all 20 judicial circuits in the state.

²⁶ *Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st DCA 1990). Section 744.361(1), F.S., provides, in part, "The guardian of an incapacitated person is a fiduciary ..."

²⁷ *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002).

²⁸ *Capital Bank v. MVP, Inc.* 644 So. 2d 515, 520 (Fla. 3d DCA 1994).

²⁹ Section 744.362, F.S.

³⁰ Section 744.367, F.S.

³¹ Section 744.3678, F.S.

³² Sections 744.368(1) and 744.369, F.S.

³³ Section 744.446(4), F.S.

³⁴ Section 744.7021, F.S.; Section 4, Chapter 99-277, L.O.F.

³⁵ Chapter 2016-40, L.O.F.

³⁶ Section 744.2007(1), F.S.

³⁷ Section 744.102(17), F.S.

³⁸ Section 744.2006(2), F.S.

Currently, the names, home addresses, telephone numbers, dates of birth, and places of employment of spouses and children of public guardians and employees with fiduciary responsibility as well as the names and location of schools and day care facilities of the children of public guardians and employees with fiduciary responsibility are subject to release pursuant to a public records request.

III. Effect of Proposed Changes:

This bill creates a public records exemption for contact and identify information held by an agency of former and current public guardians, employees with fiduciary responsibility in guardianship situations, and spouses and children of these individuals.

An employee with fiduciary responsibility is defined as an employee of a public guardian:

- Who has the ability to direct any transactions of a ward's funds, assets, or property;
- Who, under the supervision of the guardian supervises, cares for the ward; or
- Who makes any health care decision as defined in law for purposes of health care advance directives on behalf of the ward.

The public records exemption makes exempt from public disclosure:

- For former or current public guardians and employees with fiduciary responsibility, home addresses, telephone numbers, dates of birth, places of employment; and
- For spouses and children of former or current public guardians and employees with fiduciary responsibility, names, home addresses, telephone numbers, dates of birth, places of employment, and locations of schools and day care facilities attended by the children.

The required public necessity statement provides as justification for the exemption that the release of this information may and has placed current and former public guardians, employees with fiduciary responsibility, and the families of these individuals in danger of physical and emotional harm from disgruntled individuals, including wards of the guardian. The public necessity statement cites instances of threats of incarceration, violence, including death, and actual violence.

For employees with fiduciary responsibility who are current or former employees of state agencies, if the agency maintains any of the information covered by the public records exemption created in the bill (the employee's address, date of birth, etc.), the agency must only keep that information exempt if the covered individual submits a written request for maintenance of the exemption to the agency.

The public records exemption is subject to the Open Government Sunset Review Act pursuant to s. 119.15, F.S., and will be repealed October 2, 2023, unless the Legislature reviews and reenacts the exemption before that date.

The bill requires a two-thirds vote from each chamber for passage.

The bill takes effect July 1, 2018, but applies retroactively to protected information held by an agency before that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Voting Requirement

Article I, Section 24(c) of the Florida Constitution requires a two-thirds vote of each chamber for public records exemptions to pass.

Breadth of Exemption

Article I, Section 24(c) of the Florida Constitution requires a newly created public records exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill exempts certain identifying and location information of current and former public guardians, employees with fiduciary responsibility, their spouses and children. The public necessity for the exemption provides that guardians and their family members are subject to threats of emotional and physical harm from disgruntled individuals. The exemption from disclosure would help protect guardians and their families. This bill appears to be no broader than necessary to accomplish the public necessity for this public records exemption.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Private contractors would have to redact the information of the public guardian or employee with fiduciary responsibility if a public records request is made, which may cause them to incur a financial cost.

C. Government Sector Impact:

An agency would have to redact the information of the public guardian or employee with fiduciary responsibility if a public records request is made. As no appropriation is included in the bill, agencies would have to absorb cost through existing resources. However, fiscal impact is unknown at this time.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 744.21031 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS/CS by Rules on February 1, 2018:

The amendment revises the definition of ‘employee with fiduciary responsibility’ to include individuals who can direct any transactions of a ward’s funds, assets, or property. This change broadens the definition to cover persons who have the ability to control or affect more of the ward’s property, not just their financial accounts as presently written in the bill.

Additionally, under the amendment, if an employee with fiduciary responsibility currently or previously worked for a state agency, and the agency maintains any of the information covered by the public records exemption created in the bill, the agency is only required to continue keeping that information exempt if the covered individual submits a written request for maintenance of the exemption to the agency.

CS/CS by Governmental Oversight and Accountability on January 16, 2018:

The CS better clarifies who is eligible for the public records exemption by defining the term “employee with fiduciary responsibility” as an employee of a public guardian:

- Who has the ability to direct withdrawals or investments made from a ward’s financial accounts;
- Who, under the supervision of the guardian supervises care for the ward; or
- Who makes any health care decision as defined in law for purposes of health care advance directives on behalf of the ward.

CS by Children, Families, and Elder Affairs on November 13, 2017:

The amendment replaces the term “public-guardian case manager” with the term “employee with fiduciary responsibility.”

B. Amendments:

None.