

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

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Prepared By: Judiciary Committee

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BILL: CS/SB 1810

SPONSOR: Judiciary Committee and Senator Campbell

SUBJECT: Court Monitors/Public Records

DATE: April 14, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Maclure	JU	Fav/CS
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This committee substitute is the public records component to Committee Substitute for Senate Bill 64. This committee substitute makes confidential and exempt from public records law orders appointing court monitors and court monitor reports relating to medical condition, financial affairs, or mental health of a ward. Court monitors are appointed by courts “to review a guardian’s activities, assess the well-being of the ward, and ensure that the ward’s assets are being protected.”<sup>1</sup>

This committee substitute creates section 744.1076, Florida Statutes.

## II. Present Situation:

### Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1909. In 1992, Floridians adopted an amendment to the state constitution that raised the statutory right of access to public records to a constitutional level. Article I, s. 24(a) of the State Constitution provides that:

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

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<sup>1</sup> SUPREME COURT COMMISSION ON FAIRNESS, COMMITTEE ON GUARDIANSHIP MONITORING, GUARDIANSHIP MONITORING IN FLORIDA: FULFILLING THE COURT’S DUTY TO PROTECT WARDS 13 (2003).

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.

The Public Records Law<sup>2</sup> also specifies conditions under which the public must have access to governmental records. Section 119.011(11), F.S., defines the term “public records” to include:

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.

The Florida Supreme Court has interpreted this definition of public records to include all materials made or received by an agency in connection with official business which are used “to perpetuate, communicate, or formalize knowledge.”<sup>3</sup> Unless the Legislature makes these materials exempt, they are open for public inspection, regardless of whether they are in final form.<sup>4</sup>

Under Article I, s. 24(c) of the State Constitution, the Legislature may provide for the exemption of records from the open government requirements provided: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law.

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

The Open Government Sunset Review Act of 1995, s. 119.15, F.S., establishes a review and repeal process for public-records exemptions. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2, unless the Legislature reenacts the exemption. An “exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.”<sup>5</sup>

Under s. 119.15(2), F.S., an exemption may be maintained only if it meets one of the following:

- (a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- (b) The exemption is necessary for the effective and efficient administration of a governmental program; or

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<sup>2</sup> Chapter 119, F.S.

<sup>3</sup> *Shevin v. Byron, Harless, Schaffer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>4</sup> *See Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

<sup>5</sup> Section 119.15(3)(b), F.S.

(c) The exemption affects confidential information concerning an entity.

Section 119.15(4)(a), F.S., requires, as part of the review process, the consideration of the following questions:

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?

An exemption may be created or maintained only if it serves an identifiable public purpose, and it may be no broader than necessary to meet that purpose. An identifiable public purpose is served if the exemption meets one of the following purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong policy of open government and cannot be accomplished without the exemption:

- The exemption allows “the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.”
- The exemption protects “information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals.”
- The exemption protects “information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.”<sup>6</sup>

## **Guardianship**

The intent of the Florida Guardianship Law in ch. 744, F.S., is to provide the least restrictive means necessary to provide assistance to a person who is not fully capable of acting on his or her own behalf.<sup>7</sup> A guardianship is:

a trust relationship of the most sacred character, in which one person, called a “guardian,” acts for another, called the “ward,” whom the law regards as incapable of managing his own affairs.<sup>8</sup>

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<sup>6</sup> Section 119.15(4)(b), F.S.

<sup>7</sup> Section 744.1012, F.S.

<sup>8</sup> 28 Fla. Jur. 2d Guardian and Ward s. 1 (database updated November 2004).

### ***Determination of Incapacity***

Any person may file, under oath, a petition for determination of incapacity alleging that a person is incapacitated. The petition must provide factual information that demonstrates that a person is incapacitated. The petition will also state the delegable rights that an alleged incapacitated person is incapable of exercising.<sup>9</sup> These delegable rights include the right to contract, sue and defend lawsuits, apply for government benefits, manage property, determine his or her residence, consent to medical treatment, and make decisions about the incapacitated person's social environment.<sup>10</sup> If applicable, a petition for the appointment of a guardian must be filed with the petition to determine incapacity.<sup>11</sup>

After a petition for determination of incapacity has been filed, a court must appoint an examining committee comprised of three health care professionals to examine and report the condition of the alleged incapacitated person.<sup>12</sup> If the examining committee determines that the alleged incapacitated person is not incapacitated, the court must dismiss the petition for determination of incapacity.<sup>13</sup> If the examining committee determines that the alleged incapacitated person is incapacitated, the court must hold a hearing on the petition. If after a hearing the court determines that a person is incapacitated, the court must also find that alternatives to guardianship were considered and that no alternatives to guardianship will sufficiently address the problems of the incapacitated person and appoint a guardian.<sup>14</sup> The costs of a proceeding adjudicating a person as incapacitated will be paid by a guardian from the property of the ward.<sup>15</sup> If a petition for determination of incapacity is dismissed, the costs of the proceedings may be assessed against the petitioner.<sup>16</sup>

### ***Authority of a Guardian***

An order appointing a guardian must specify the specific powers and duties of the guardian and the delegable rights which have been removed from the ward.<sup>17</sup> The order must preserve an incapacitated person's right to make decisions to the extent that he or she is able to do so.<sup>18</sup> A guardian is empowered with the authority to protect the assets of the ward and to use the ward's property to provide for his or her care.<sup>19</sup> Some powers under s. 744.441, F.S., which may only be exercised by a guardian with court approval, include the power to:

- (2) Execute, exercise, or release any powers as trustee, personal representative, custodian for minors, conservator, or donee of any power of appointment or other power that the ward might have lawfully exercised, consummated, or executed if not incapacitated, if the best interest of the ward requires such execution, exercise, or release.

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<sup>9</sup> Section 744.3201(1) and (2), F.S.

<sup>10</sup> Section 744.3215(3), F.S.

<sup>11</sup> Section 744.3201(3), F.S.

<sup>12</sup> Section 744.331(3), F.S.

<sup>13</sup> Section 744.331(4), F.S.

<sup>14</sup> See s. 744.331(6)(b) and (f), F.S.

<sup>15</sup> Section 744.331(7)(b), F.S.

<sup>16</sup> Section 744.331(7)(c), F.S.

<sup>17</sup> Section 744.344(1), F.S.

<sup>18</sup> Section 744.344(2), F.S.

<sup>19</sup> See ss. 744.361(4) and 744.444, F.S.

(11) Prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the guardian in the performance of his or her duties.

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(19) Create revocable or irrevocable trusts of property of the ward's estate which may extend beyond the disability or life of the ward in connection with estate, gift, income, or other tax planning or in connection with estate planning.

The forgoing statutory provisions appear to authorize a guardian to exercise a ward's rights under a revocable trust. This right may include the right to revoke the trust. Accordingly, a guardian was authorized by a court to exercise a ward's authority under a revocable trust to appoint a new trustee.<sup>20</sup> In so holding, the court determined that a guardian with court approval has "the power not only to execute the powers of the ward, but to exercise or release any powers the ward would have as trustee, personal, representative, custodian, conservator or donee."<sup>21</sup>

In *Ullman v. Garcia*, however, the court would not allow a guardian to attack the validity of a revocable trust that was alleged to have been created through undue influence. The case did not involve an attempt by a guardian to revoke the revocable trust. The court stated in holding that the guardian could not attack the validity of the trust:

that the guardian of an incapacitated person cannot seek to rewrite the testamentary plan of a ward by contesting the validity of a revocable trust on the basis of undue influence. A finding to the contrary would defeat the evident purpose of the settlor/ward, and interfere with the settlor/ward's vested right to dispose of her property as she pleases.<sup>22</sup>

### ***Court Monitors***

Court monitoring is a mechanism "courts can use to review a guardian's activities, assess the well-being of the ward, and ensure that the ward's assets are being protected."<sup>23</sup> Court monitors may be appointed by a court upon inquiry by an interested person or upon its own motion. They may be compensated from the property of the ward. However, full-time state, county, or municipal employees may not be compensated for acting as a court monitor.<sup>24</sup>

A court monitor has the authority to investigate, seek information, examine documents, and interview the ward. The court monitor's findings must be reported to the court.<sup>25</sup> Court monitoring is necessary because often after a person is declared incapacitated no one exists to bring concerns about the ward to the attention of the court.<sup>26</sup> According to the Supreme Court

<sup>20</sup> *In Re Guardianship of Muller v. Boyle*, 650 So. 2d 698, 699 (Fla. 4th DCA 1995).

<sup>21</sup> *Id.* at 700 (quoting an unidentified House staff analysis summary).

<sup>22</sup> *Ullman v. Garcia*, 645 So. 2d 168, 170 (Fla. 3d DCA 1994).

<sup>23</sup> SUPREME COURT COMMISSION ON FAIRNESS, COMMITTEE ON GUARDIANSHIP MONITORING, GUARDIANSHIP MONITORING IN FLORIDA: FULFILLING THE COURT'S DUTY TO PROTECT WARDS 13 (2003).

<sup>24</sup> Section 744.107, F.S.

<sup>25</sup> Section 744.107, F.S.

<sup>26</sup> SUPREME COURT COMMISSION ON FAIRNESS, *supra* note 23.

Commission on Fairness, Committee on Guardianship Monitoring, “there is a need for greater oversight [of guardians], to protect individuals who are subject to guardianship.”<sup>27</sup>

### III. Effect of Proposed Changes:

This committee substitute is the public records component to Committee Substitute for Senate Bill 64. This committee substitute makes confidential and exempt from public records law orders appointing court monitors and court monitor reports relating to medical condition, financial affairs, or mental health of a ward. Court monitors are appointed by courts “to review a guardian’s activities, assess the well-being of the ward, and ensure that the ward’s assets are being protected.”<sup>28</sup>

A guardian, however, will likely become aware of the existence of an order appointing a court monitor if the court takes adverse action against a guardian or submits a bill to a guardian for the cost of appointing a court monitor. Additionally, the provisions of the public record exemptions created in this committee substitute appear to be in conflict with provisions of CS/SB 64. Under CS/SB 64, court monitor reports must “be served on the guardian, the ward, and such other persons as the court may determine.”<sup>29</sup>

This committee substitute takes effect on the same date as House Bill 457 or similar legislation adopted this session becomes law. House Bill 457 takes effect upon becoming a law.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

#### B. Public Records/Open Meetings Issues:

Under Article I, s. 24(c) of the State Constitution, a law creating an exemption from public records laws: “shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law.”

The public records exemption created by the committee substitute may be broader than necessary. First, the public records exemption for court monitor reports may need only exempt the names of witnesses, medical and mental health information, and financial information. The committee substitute appears to exempt an entire report from public disclosure when the report contains medical and mental health information or financial information.<sup>30</sup> Secondly, the public records exemption may not need to exempt orders appointing a court monitor from public disclosure for an indefinite period of time.

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<sup>27</sup> SUPREME COURT COMMISSION ON FAIRNESS, *supra* note 23, at 4.

<sup>28</sup> SUPREME COURT COMMISSION ON FAIRNESS, COMMITTEE ON GUARDIANSHIP MONITORING, GUARDIANSHIP MONITORING IN FLORIDA: FULFILLING THE COURT’S DUTY TO PROTECT WARDS 13 (2003).

<sup>29</sup> Committee Substitute for Senate Bill 64, First Engrossed, page 3, lines 25-27

<sup>30</sup> *See Doe v. State*, 2005 WL 662711 (Fla. 4th DCA 2005) (stating that the name of a confidential source in a criminal investigation should be redacted from otherwise public records).

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The public records exemption created by the committee substitute may protect a ward's privacy and information relating to his or her financial status and thereby prevent identity theft.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The Legislature may wish to codify section 2 of the committee substitute within the newly created s. 744.1076, F.S., as a separate subsection. As a result, readers of the Florida Statutes will be on notice that the public records exemption created by the committee substitute is subject to the Open Government Sunset Review Act.





## **VIII. Summary of Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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