

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 947 CS Public Records Exemptions
SPONSOR(S): Bogdanoff
TIED BILLS: HB 457 IDEN./SIM. BILLS: SB 1810

Table with 4 columns: REFERENCE, ACTION, ANALYST, STAFF DIRECTOR. Row 1: Civil Justice Committee, 4 Y, 0 N, w/CS, Lammers, Billmeier. Row 2: Governmental Operations Committee, Williamson, Everhart. Rows 3-5 are blank.

SUMMARY ANALYSIS

This bill, a public records exemption companion to HB 457, provides that the orders appointing court monitors and emergency court monitors are confidential and exempt from public disclosure. It also provides that the reports filed by court monitors relating to the medical condition, financial affairs, or mental health of the ward, and orders relating to probable cause, pursuant to s. 744.1075, F.S., are confidential and exempt from public disclosure.

HB 457 creates an emergency court monitor statute which allows the court to appoint a court monitor for a limited amount of time without prior notice or a hearing and increases the trial court's authority to appoint court monitors to review and report on the treatment of wards by their guardians.

This bill provides for future review and repeal of the exemptions on October 2, 2010, provides a statement of public necessity, and provides a contingent effective date.

This bill does not appear to have a significant fiscal impact.

This bill requires a two-thirds vote of the members present and voting for passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – This bill creates a new public records exemption.

B. EFFECT OF PROPOSED CHANGES:

Background

Current Law

Section 744.107, F.S., allows the court to appoint a monitor “upon inquiry from any interested person” or upon its own motion. The monitor has authority to “investigate, seek information, examine documents, or interview the ward,” and to present a report of such findings to the court.¹ A family member or any other person with an interest in the proceedings may not serve as a monitor.² A monitor may be paid a reasonable fee from the property of the ward, but no state, county, or municipal employee shall be paid a fee for serving as a monitor.³ The orders appointing court monitors and the reports of court monitors are not currently exempt from public disclosure.

HB 457

HB 457, to which this bill is the public records exemption companion, creates section 744.1075, F.S., entitled “emergency court monitor.” It states that a court may, upon inquiry from any interested person or upon its own motion, appoint a court monitor on an emergency basis without notice. The limitation on this authority is explained in the proposed s. 744.1075(1), F.S.:

The court must specifically find that there appears to be imminent danger that the physical or mental health or safety of the ward will be seriously impaired or that the ward’s property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.

The court order must specifically name the powers and duties of the monitor and the matters to be investigated. HB 457 provides that, pursuant to s. 744.1076, F.S., a section created by this bill, the order of appointment is confidential until the existence or absence of probable cause is determined. Fifteen days after entering the order of appointment, the monitor must file a verified report of findings and recommendations to the court, along with supporting documents or evidence. After reviewing the monitor’s report, the court must determine whether or not there is probable cause to take further action on behalf of the ward’s person or property. If there is no probable cause, the court must issue an order so stating and discharge the monitor.

If probable cause is found to exist, the court must issue a show cause order directing the guardian or other respondent to state the essential facts constituting the charge and directing the respondent to appear and show cause as to why the court should not take further action. The order must name a time and place for a hearing and provide “a reasonable time to allow for the preparation of a defense after service of the order.” The authority of an emergency monitor is limited to 60 days or until an order showing no cause is issued. However, the monitor’s authority may be extended by 30 days if there is a showing that emergency conditions still exist. Prior to the hearing on the order to show cause, the court may take action to protect the ward’s physical or mental health, safety, or assets, including

¹ Section 744.107, F.S.

² *Id.*

³ *Id.*

issuing a temporary injunction, restraining order, or an order freezing assets. The court must give a copy of such order to all parties. After the hearing on the show cause order, the court may impose sanctions on the guardian, his or her attorney, or any other respondent, and the court may also take any other action authorized by law.

Effect of Bill

This bill makes the order of any court appointing a monitor pursuant to s. 744.107, F.S., and the required reports submitted by the monitor relating to the medical condition, financial affairs, or mental health of the ward, confidential and exempt from the requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the Florida Constitution.⁴ The reports and orders may be subject to inspection as determined by the court, as provided in s. 744.107, F.S. HB 457 provides for service of the order of appointment and the monitor's report upon the guardian, the ward, and such other persons as determined by the court.

The bill also makes the order of any court appointing a monitor on an emergency basis, pursuant to s. 744.1075, F.S., the reports submitted by the monitor relating to the medical condition, financial affairs, or mental health of the ward, and subsequent court orders finding no probable cause or orders to show cause, confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the Florida Constitution.⁵ However, the orders and reports may be subject to inspection as determined by the court pursuant to s. 744.1075, F.S. HB 457 provides that the court must transmit orders or injunctions "to all parties" at the time the order or injunction is entered.

It is unclear how the court appointed monitor or emergency monitor will be able to gather information for his or her reports if the order appointing that monitor is made confidential and exempt from public disclosure. In order to gather information from certain parties, the monitor must show those parties the order appointing him or her as a monitor. This is in order to verify that the monitor can view information, such as medical records and financial records. If the order appointing the monitor is made confidential and exempt from public disclosure, then that order cannot be viewed by any person not authorized by the court, thus creating an added burden.

The bill provides for future review and repeal of the exemptions on October 2, 2010, pursuant to the Open Government Sunset Review Act of 1995. It also provides a statement of public necessity. However, the public necessity statement does not address the need for making confidential and exempt court determinations relating to probable cause, court orders finding no probable cause, and court orders to show cause.

The bill provides an effective date that is contingent upon the passage of HB 457 or similar legislation.

C. SECTION DIRECTORY:

Section 1. Creates s. 744.1076, F.S., creating a public records exemption for a court order appointing a court monitor or emergency court monitor, certain reports of the monitors, and court determinations relating to probable cause in cases involving emergency court monitors.

Section 2. Provides for future legislative review and repeal.

⁴ There is a difference between information and records that the Legislature has made exempt from public disclosure and those the Legislature has made confidential and exempt. Information and records that are simply made exempt from public disclosure are still permitted to be disclosed under certain circumstances. See *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). If the Legislature makes certain information and records confidential and exempt from public disclosure, such information and records may not be released by the records custodian to anyone other than the persons or entities specifically designated in the statutory exemption. See *Attorney General Opinion 85-62*, August 1, 1985.

⁵ See note 4.

Section 3. Provides a statement of public necessity.

Section 4. Provides a contingent effective date.

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:

None.

D. FISCAL COMMENTS:

The public records law in general creates a significant, although unquantifiable, increase in government spending. Government employees must locate requested documents and information, and must examine every requested document or piece of information to determine if a public records exemption prohibits release of the document or information. Passage of any new public records exemption will result in a minimal negative non-recurring fiscal impact, because governments will be required to communicate the new exemption to employees responsible for complying with public records requests. Every public records exemption also represents an unknown negative recurring expense to governments, as each exemption slightly increases the number and complexity of the training and management materials required to be maintained by governments, further complicates the process of complying with public records requests, and increases the chances that a government will be involved in litigation. There is no known reliable method for determining the marginal fiscal impact attributable to a single public records exemption.

Because there are similar exemptions in current law, state and local governments should already have processes in place to comply with the law, thus minimizing the cost.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

Vote Requirements

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 public records or public meetings exemption.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution requires that a bill “state with specificity the public necessity justifying the exemption.” This bill does not provide a statement of public necessity addressing the need to make confidential and exempt court determinations relating to probable cause, court orders finding no probable cause, and court orders to show cause.

Public Records Law

Article I, s. 24(a), of the Florida Constitution sets forth the state’s public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of the government.

In general, “all court records are presumed open.”⁶ Subject to the rulemaking power of the Florida Supreme Court, as provided by art. V, s. 2, of the Florida Constitution, the public shall have access to all records of the judicial branch of government and its agencies, except as otherwise provided.⁷ Various court records are presently deemed confidential by court rule, by Florida Statutes, and by prior case law of the state.⁸

The Legislature may provide for the exemption of records from the requirements of Art. I, s. 24, of the Florida Constitution by passage of a general law. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07(1), F.S., also guarantees every person a right to inspect, examine, and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act of 1995⁹ provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following public purposes: 1. Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption; 2. Protecting 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; or, 3. Protecting trade or business secrets.

B. RULE-MAKING AUTHORITY:

This bill does not grant rule-making authority to any administrative agency.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill provides that orders appointing court monitors, reports of court monitors relating to the medical condition, financial affairs, or mental health of the ward, court determinations relating to probable

⁶ *Times Publishing Co. v. Ake*, 660 So. 2d 255, 257 (Fla. 1995).

⁷ *In re Amendments to Rule of Judicial Administration 2.051—Public Access to Judicial Records*, 651 So. 2d 1185, 1188 (Fla. 1995).

⁸ *Id.* at 1189; Rule of Judicial Administration 2.051(c)(9).

⁹ Section 119.15, F.S.

cause, and court orders finding no probable cause or to show cause, are all confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the Florida Constitution. However, the bill's statement of public necessity does not explain why the determinations relating to probable cause and orders to show cause or finding no probable cause should be confidential and exempt from public disclosure.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The Civil Justice Committee considered this bill on March 16, 2005, and adopted one amendment. The amendment to the bill states that only reports of court monitors relating to the medical condition, financial affairs, or mental health of the ward shall be confidential and exempt, rather than making all court monitor reports confidential and exempt. The order appointing the court monitor and emergency court monitor remains confidential and exempt from public records requirements.

The Civil Justice Committee reported the bill favorably with as HB 947 with a committee substitute.