

# 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: Governmental Oversight and Productivity Committee

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BILL: SB 358

INTRODUCER: Senator Campbell

SUBJECT: Court Monitors/Public Records

DATE: March 7, 2006

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cibula</u>	<u>Maclure</u>	<u>JU</u>	<b>Favorable</b>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<b>Favorable</b>
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This bill is the public records component to Senate Bill 356. Senate Bill 356, in part, increases a court's ability to use court monitors to oversee or investigate guardians to protect the health, safety, and property of wards. Under this bill, the following records relating to court monitors are confidential and exempt from public records laws that would otherwise require their disclosure:

- Orders appointing a court monitor or emergency court monitor;
- Reports of a court monitor relating to the medical condition, financial affairs, or mental health of the ward; and
- Court determinations relating to a finding that no further action is needed to protect a ward.

The orders appointing a court monitor and reports of a court monitor lose their confidential and exempt status if a court determines that probable cause exists to take further action to protect a ward. Those records, however, may remain confidential and exempt under other statutes. Nevertheless, a court may make any of the records made confidential and exempt under the bill subject to inspection upon good cause shown.

This bill creates new exemptions and, as a result, is subject to the requirement of s. 24(c), Art. I of the State Constitution that two-thirds of the members present and voting in each house pass the bill.

This bill creates section 744.1076, Florida Statutes.

## II. Present Situation:

**Public Records Law** – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.<sup>1</sup> The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted

. . . to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.<sup>2</sup>

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>3</sup> Article I, s. 24 of the State Constitution, provides that:

(a) Every person<sup>4</sup> 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. . . .

Unless specifically exempted, all agency<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>8</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>9</sup> 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

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<sup>1</sup> Sections 1390, 1391, F.S. (Rev. 1892).

<sup>2</sup> *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).

<sup>3</sup> Article I, s. 24 of the State Constitution.

<sup>4</sup> Section 1.01(3), F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

<sup>5</sup> 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.”

<sup>6</sup> Section 119.011(11), F.S.

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>8</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>9</sup> Article I, s. 24(c) of the State Constitution.

accomplish the stated purpose of the law.<sup>10</sup> A bill enacting an exemption<sup>11</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>12</sup> A bill creating an exemption must be passed by a two-thirds vote of both houses.<sup>13</sup>

The Public Records Act<sup>14</sup> specifies conditions under which public access must be provided to records of the executive branch and other agencies. 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.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.<sup>15</sup> The records custodian must state the basis for the exemption, in writing if requested.<sup>16</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.<sup>17</sup> 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.<sup>18</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>19</sup>

**The Open Government Sunset Review Act** - The Open Government Sunset Review Act<sup>20</sup> provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee 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 identifiable public purpose is served if the exemption:

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<sup>10</sup> *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).

<sup>11</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>12</sup> Art. I, s. 24(c) of the State Constitution.

<sup>13</sup> *Ibid.*

<sup>14</sup> Chapter 119, F.S.

<sup>15</sup> Section 119.07(1)(b), F.S.

<sup>16</sup> Section 119.07(1)(c) and (d), F.S.

<sup>17</sup> *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5<sup>th</sup> DCA), rev. denied 892 So.2d 1015 (Fla. 2004).

<sup>18</sup> *Ibid* at 53; see also, Attorney General Opinion 85-62.

<sup>19</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>20</sup> Section 119.15, F.S.

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- [p]rotects 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
- [p]rotects 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.<sup>21</sup>

The act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If yes, 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?

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.<sup>22</sup> The Legislature is only limited in its review process by constitutional requirements. 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.

## **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>23</sup> A guardianship is:

<sup>21</sup> Section 119.15(4) (b), F.S.

<sup>22</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

<sup>23</sup> Section 744.1012, F.S.

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>24</sup>

### ***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>25</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>26</sup> If applicable, a petition for the appointment of a guardian must be filed with the petition to determine incapacity.<sup>27</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>28</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>29</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 appoint a guardian.<sup>30</sup> The costs of a proceeding adjudicating a person as incapacitated will be paid by a guardian from the property of the ward.<sup>31</sup> If a petition for determination of incapacity is dismissed, the costs of the proceedings may be assessed against the petitioner.<sup>32</sup>

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

An order appointing a guardian must specify the specific powers and duties of the guardian and the delegable rights that have been removed from the ward.<sup>33</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>34</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>35</sup>

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<sup>24</sup> 28 Fla. Jur. 2d Guardian and Ward s. 1 (database updated October 2005).

<sup>25</sup> Section 744.3201(1) and (2), F.S.

<sup>26</sup> Section 744.3215(3), F.S.

<sup>27</sup> Section 744.3201(3), F.S.

<sup>28</sup> Section 744.331(3), F.S.

<sup>29</sup> Section 744.331(4), F.S.

<sup>30</sup> See s. 744.331(6)(b) and (f), F.S.

<sup>31</sup> Section 744.331(7)(b), F.S.

<sup>32</sup> Section 744.331(7)(c), F.S.

<sup>33</sup> Section 744.344(1), F.S.

<sup>34</sup> Section 744.344(2), F.S.

<sup>35</sup> See ss. 744.361(6) and 744.444, F.S.

## 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>36</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>37</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>38</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>39</sup>

### III. Effect of Proposed Changes:

This bill is the public records component to Senate Bill 356. Senate Bill 356, in part, increases a court’s ability to use court monitors to oversee and investigate guardians to protect the health, safety, and property of wards.

This bill makes confidential and exempt from public records law an order appointing a court monitor pursuant to s. 744.107, F.S. The reports of an appointed court monitor relating to the medical condition, financial affairs, or mental health of the ward required pursuant to s. 744.107, F.S., are made confidential and exempt, as well, though they may be subject to inspection as determined by the court or upon a showing of good cause. These exemptions expire when the court finds probable cause to take further action to protect a ward or the ward’s property, unless the information is otherwise confidential and exempt.

Further, the bill makes confidential and exempt an order of a court appointing an emergency court monitor. Reports of a monitor appointed on an emergency basis relating to medical condition, financial affairs, or mental health of the ward required pursuant to s. 744.1075, F.S., are made confidential and exempt, though they may be subject to inspection as determined by the court or upon a showing of good cause. These exemptions expire when the court finds probable cause to take further action to protect the ward or the ward’s property, unless the information is otherwise confidential and exempt.

Lastly, the bill makes confidential and exempt court determinations relating to a finding that no probable cause exists to take additional action to protect a ward. These court determinations pursuant to s. 744.107 or s. 744.1075, F.S., are made confidential and exempt, though they may be subject to inspection as determined by the court upon a showing of good cause.

This bill takes effect on the same date as House Bill 191 or similar legislation adopted this session becomes law. House Bill 191 and Senate Bill 356, which is the companion to House Bill 191, take effect upon becoming a law.

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<sup>36</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>37</sup> Section 744.107, F.S.

<sup>38</sup> *Id.*

<sup>39</sup> Supreme Court Commission on Fairness, *supra* note 18.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

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

This bill creates new public records exemptions and, as a result, is subject to the requirement of s. 24(c), Art. I of the State Constitution that two-thirds of the members present and voting in each house of the Legislature pass the bill.

**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 bill 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:**

None.





## **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 introducer or the Florida Senate.

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