

# 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: SB 358

INTRODUCER: Senator Campbell

SUBJECT: Court Monitors/Public Records

DATE: December 2, 2005

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Maclure	JU	<b>Favorable</b>
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____
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 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. Section (24)(a), Art. I 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 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>1</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>2</sup> Unless the Legislature makes these materials exempt, they are open for public inspection, regardless of whether they are in final form.<sup>3</sup>

Under s. 24(c), Art. I, 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, s. 119.15, F.S., provides for the automatic repeal of new public records exemption on October 2, in the fifth year after enactment, unless the

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<sup>1</sup> Chapter 119, F.S.

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

<sup>3</sup> *See Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

Legislature reenacts the exemption. 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>4</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>5</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>6</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>7</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>8</sup> If applicable, a petition for the appointment of a guardian must be filed with the petition to determine incapacity.<sup>9</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

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

<sup>5</sup> Section 744.1012, F.S.

<sup>6</sup> 28 Fla. Jur. 2d Guardian and Ward s. 1 (database updated October 2005).

<sup>7</sup> Section 744.3201(1) and (2), F.S.

<sup>8</sup> Section 744.3215(3), F.S.

<sup>9</sup> Section 744.3201(3), F.S.

the alleged incapacitated person.<sup>10</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>11</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>12</sup> The costs of a proceeding adjudicating a person as incapacitated will be paid by a guardian from the property of the ward.<sup>13</sup> If a petition for determination of incapacity is dismissed, the costs of the proceedings may be assessed against the petitioner.<sup>14</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>15</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>16</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>17</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>18</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>19</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>20</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>21</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.

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<sup>10</sup> Section 744.331(3), F.S.

<sup>11</sup> Section 744.331(4), F.S.

<sup>12</sup> See s. 744.331(6)(b) and (f), F.S.

<sup>13</sup> Section 744.331(7)(b), F.S.

<sup>14</sup> Section 744.331(7)(c), F.S.

<sup>15</sup> Section 744.344(1), F.S.

<sup>16</sup> Section 744.344(2), F.S.

<sup>17</sup> See ss. 744.361(6) and 744.444, F.S.

<sup>18</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>19</sup> Section 744.107, F.S.

<sup>20</sup> *Id.*

<sup>21</sup> SUPREME COURT COMMISSION ON FAIRNESS, *supra* note 18.

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.

#### **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.

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

None.

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