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 Judiciary Committee

BILL:	SB 568
INTRODUCER:	Judiciary Committee
SUBJECT:	Open Government Sunset Review/Court Records Related to Court Monitors
DATE:	February 21, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Treadwell/Maclure	Maclure	JU	**Favorable**
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

This bill is the result of the Judiciary Committee's Open Government Sunset Review of the public-records exemptions for orders appointing nonemergency and emergency court monitors, monitors' reports, and orders finding no probable cause in guardianship proceedings. These public-records exemptions stand repealed on October 2, 2011, unless reenacted by the Legislature.

The bill retains the exemptions and makes organizational changes for clarity. The bill also removes the confidential status of court orders appointing nonemergency court monitors and makes these orders exempt rather than confidential and exempt. In addition, the bill eliminates a reference to "court determinations" in the public-records exemption relating to determinations and orders finding no probable cause for further court action.

This bill substantially amends section 744.1076, Florida Statutes.

II. Present Situation:

Florida Public-Records Law

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public-records law in 1892.[1] One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level:

[1] Sections 1390, 1391 F.S. (Rev. 1892).

> 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.[2]

Consistent with this constitutional provision, Florida's Public-Records Act provides that, unless specifically exempted, all public records must be made available for public inspection and copying.[3]

The term "public records" 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.[4]

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency[5] in connection with official business which are used to "perpetuate, communicate, or formalize knowledge of some type."[6] Unless made exempt, all such materials are open for public inspection as soon as they become records.[7]

Only the Legislature is authorized to create exemptions to open-government requirements.[8] Exemptions must be created by general law, which must specifically state the public necessity justifying the exemption.[9] Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.[10] A bill enacting an exemption or substantially amending an existing exemption[11] may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[12]

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[2] FLA. CONST. art. I, s. 24(a).
[3] Section 119.07, F.S.
[4] Section 119.011(12), F.S.
[5] 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."
[6] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).
[7] *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).
[8] FLA. CONST. art. I, s. 24(c).
[9] *Id.*
[10] *Id.*
[11] Pursuant to s. 119.15(4)(b), F.S., an existing exemption is substantially amended if the exemption is expanded to cover additional records or information.
[12] FLA. CONST. art. I, s. 24(c).

There is a difference between records that the Legislature makes exempt from public inspection and those that it makes exempt and confidential.[13] If the Legislature makes a record exempt and confidential, the information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[14] If a record is simply made exempt from disclosure requirements, the exemption does not prohibit the showing of such information at the discretion of the agency holding it.[15]

Public Access to Court Records

Although Florida courts have consistently held that the judiciary is not considered an "agency" for purposes of the Public-Records Act,[16] the Florida Supreme Court has found that "both civil and criminal proceedings in Florida are public events" and that it will "adhere to the well established common law right of access to court proceedings and records."[17] Furthermore, there is a constitutional guarantee of access to judicial records established in the Florida Constitution.[18] This constitutional provision provides for public access to judicial records, except for those records expressly exempted by the Florida Constitution, Florida law in effect on July 1, 1993, court rules in effect on November 3, 1992, or by future acts of the Legislature in accordance with the Constitution.[19]

Open Government Sunset Review Act

The Open Government Sunset Review Act provides for the systematic review of exemptions from the Public-Records Act on a five-year cycle ending October 2 of the fifth year following the enactment or substantial amendment of an exemption.[20] Each year, by June 1, the Division of Statutory Revision of the Office of Legislative Services 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.[21] Under the Open Government Sunset Review Act, an exemption may be created, revised, or retained only if it serves an identifiable public purpose and it is no broader than necessary to meet the public purpose it serves. [22] An identifiable public purpose is served if the exemption meets one of three specified purposes and 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 exemption meets the statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;

[13] *WFTV, Inc. v. School Bd. of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).
[14] *Id.*
[15] *Id.* at 54.
[16] *Times Publishing Co. v. Ake*, 660 So. 2d 255 (Fla. 1995) (holding that the judiciary, as a coequal branch of government, is not an "agency" subject to control by another coequal branch of government).
[17] *Barron v. Florida Freedom Newspapers*, 531 So. 2d 113, 116 (Fla. 1988).
[18] FLA. CONST. art. I, s. 24.
[19] *Id.*
[20] Section 119.15(3), F.S.
[21] Section 119.15(5)(a), F.S.
[22] Section 119.15(6)(b), F.S.

- Protects 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 the safety of such individuals; or
- 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 would injure the affected entity in the marketplace.[23]

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 so, 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?[24]

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.[25] 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.[26]

Any person may file, under oath, a petition for determination of incapacity alleging that a person is incapacitated. 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.[27] If the examining committee determines that the alleged incapacitated person is not incapacitated, the court must dismiss the petition for determination of incapacity.[28] 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.[29]

[23] *Id.*
[24] Section 119.15(6)(a), F.S.
[25] Section 744.1012, F.S.
[26] 28 FLA. JUR. 2D *Guardian and Ward* s. 1 (2004).
[27] Section 744.331(3), F.S.
[28] Section 744.331(4), F.S.
[29] *See* s. 744.331(6)(b) and (f), F.S.

Authority of a Guardian

An order appointing a guardian must prescribe the specific powers and duties of the guardian and the delegable rights that have been removed from the ward.[30] The order must preserve an incapacitated person's right to make decisions to the extent that he or she is able to do so.[31] 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.[32] Some of the guardians' powers may only be exercised with court approval.[33]

Court Monitoring in Guardianship Cases

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."[34] 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.[35] According to the Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, "there is a need for greater oversight [of guardians], to protect individuals who are subject to guardianship."[36]

Nonemergency Court Monitors

Court monitors may be appointed by a court upon inquiry by an interested person or upon its own motion. However, a family or any person with a personal interest in the proceedings may not serve as a monitor.[37] The order appointing the monitor must be served upon the guardian, the ward, and any other person determined by the court.

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, and if it appears from the monitor's report that further action by the court is necessary to protect the ward's interests, the court must hold a hearing with notice and enter any order necessary to protect the ward.[38] A monitor may receive a reasonable fee paid from the property of the ward for his or her services.[39] If the court determines that a motion to appoint a court monitor was made in bad faith, the court may assess the costs of the proceeding, including attorney's fees, against the movant.[40]

[30] Section 744.344(1), F.S.
[31] Section 744.344(2), F.S.
[32] *See* ss. 744.361(4) and 744.444, F.S.
[33] Section 744.441, F.S.
[34] Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, *Guardianship Monitoring in Florida: Fulfilling the Court's Duty to Protect Ward*, 13 (2003).
[35] *Id.*
[36] *Id.* at 4.
[37] Section 744.107(1), F.S.
[38] Section 744.107(3), F.S. These actions include amending the plan, requiring an accounting, ordering production of assets, freezing assets, suspending a guardian, or initiating proceedings to remove a guardian.
[39] Section 744.107(4), F.S. A full-time state, county, or municipal employee or officer cannot be paid a fee for services as a court monitor.
[40] *Id.*

Emergency Court Monitors

Upon inquiry of an interested party or its own volition, the court may appoint a court monitor on an emergency basis without providing notice to the guardian, the ward, or other interested parties.[41] 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
- The ward's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.[42]

Within 15 days after the entry of the order appointing the monitor, the monitor must file his or her report of findings and recommendations to the court. The court reviews the report and determines whether there is probable cause to take further action to protect the ward.[43] If the court finds probable cause, it must issue an order to show cause to the guardian or other respondent including the specific facts constituting the conduct charged and requiring the respondent to appear before the court to address the allegations.[44] Following the show-cause hearing, the court may impose sanctions on the respondent and take any other action necessary to protect the ward.[45]

Identical to the provisions governing nonemergency court monitors, an emergency court monitor may receive a reasonable fee paid from the property of the ward for his or her services.[46] If the court determines that a motion to appoint an emergency court monitor was made in bad faith, the court may assess the costs of the proceeding, including attorney's fees, against the movant.[47]

Court-Records Exemptions Relating to Court Monitors

In conjunction with the creation of the court monitor system in guardianship proceedings, the Legislature created exemptions from public access to judicial records related to court monitors in guardianship proceedings. Under these public-records exemptions, any order of a court appointing a nonemergency court monitor is confidential and exempt from public disclosure.[48] Similarly, the reports of an appointed court monitor relating to the medical condition, financial affairs, or mental health of the ward are confidential and exempt from public disclosure.[49] The public may access these records as determined by the court or upon demonstration of good cause to review the records. This exemption expires, and the public may access these records, if a court makes a finding of probable cause for further court action after consideration of the court

[41] Section 744.1075(1)(a), F.S.
[42] *Id.*
[43] Section 744.1075(3), F.S.
[44] Section 744.1075(4)(a), F.S.
[45] Section 744.1075(4)(c), F.S. These actions include: entering a judgment of contempt; ordering an accounting; freezing assets; referring the case to local law enforcement agencies or the state attorney; filing an abuse, neglect, or exploitation complaint with the Department of Children and Families; or initiating proceedings to remove the guardian.
[46] Section 744.1075(5), F.S. A full-time state, county, or municipal employee or officer cannot be paid a fee for services as an emergency court monitor.
[47] *Id.*
[48] Section 744.1076(1)(a), F.S. The companion exemption for emergency court monitors contained in s. 744.1076(2)(a), F.S., is only "exempt" rather than "confidential and exempt."
[49] Section 744.1076(1)(b), F.S.

monitor's report.[50] However, information in the report that is otherwise made confidential or exempt by law retains its confidential or exempt status.

In the emergency court monitor context, a similar public-records exemption exists in Florida law. Any order of a court appointing an emergency court monitor is exempt from public disclosure.[51] Similarly, the reports of an appointed court monitor relating to the medical condition, financial affairs, or mental health of the ward are confidential and exempt from public disclosure.[52] The public may access these records as determined by the court or upon demonstration of good cause to review the records. This exemption expires, and the public may access these records, if a court makes a finding of probable cause for further court action after consideration of the court monitor's report.[53] However, information in the report that is otherwise made confidential or exempt by law retains its confidential or exempt status.

Court determinations relating to a finding of no probable cause and court orders finding no probable cause in the nonemergency and emergency court monitor contexts are also confidential and exempt from public disclosure.[54] However, the court may allow access to these determinations and orders upon a showing of good cause.

In its statement of public necessity accompanying the creation of these exemptions, the Legislature recognized that:

> release of the exempt order [appointing court monitors] would produce undue harm to the ward. In many instances, a court monitor is appointed to investigate allegations that may rise to the level of physical neglect or abuse or financial exploitation. When such allegations are involved, if the order of appointment is public, the target of the investigation may be made aware of the investigation before the investigation is even underway, raising the risk of concealment of evidence, intimidation of witnesses, or retaliation against the reporter. The Legislature finds that public disclosure of the exempt order would hinder the ability of the monitor to conduct an accurate investigation if evidence has been concealed and witnesses have been intimidated.[55]

With regard to the reports of court monitors, the Legislature recognized that release of these reports would produce undue harm to the ward and hinder the investigation of the monitor. In addition, the Legislature stated that the reports may contain sensitive, personal information that, if released, could cause harm or embarrassment to the ward or his or her family.

The Legislature concluded that it is a public necessity that court determinations relating to a finding of no probable cause and court orders finding no probable cause must be made confidential and exempt because unfounded allegations against a guardian could be damaging to

[50] Section 744.1076(1)(c), F.S.
[51] Section 744.1076(2)(a), F.S.
[52] Section 744.1076(2)(b), F.S.
[53] Section 744.1076(2)(c), F.S.
[54] Section 744. 1076(3), F.S.
[55] Laws of Fla. 2006-129, s. 2.

the reputation of the guardian and cause undue embarrassment as well as could invade the guardian's privacy.[56]

The public-records exemptions will stand repealed on October 2, 2011, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act.

Judiciary Committee's Open Government Sunset Review

During its review of these public-records exemptions under the Open Government Sunset Review Act, the professional staff of the Judiciary Committee interviewed judges, guardianship practitioners, clerks of court, the Florida Department of Elder Affairs, The Florida Bar, and other interested parties to gauge the utility of the exemptions. Senate professional staff also reviewed guardianship files in which a court monitor had been appointed. As a result of the interviews and file review, Senate professional staff recommended that the Legislature retain the public-records exemptions established in s. 744.1076, F.S., which make orders appointing nonemergency and emergency court monitors, reports of those monitors, and findings of no probable cause exempt or confidential and exempt from public disclosure.[57] Senate professional staff concluded that, in addition to protecting the ward from the disclosure of information of a sensitive, personal nature, the exemptions also protect a guardian from unwarranted damage to his or her reputation. Furthermore, these exemptions are arguably necessary for the administration of the court monitor process.[58]

Senate professional staff also recommended that the Legislature consider reorganizing the exemptions for clarity and providing that the order appointing a nonemergency court monitor be "exempt" only rather than "confidential and exempt." This change would make the exemption consistent with the current public-records exemption for orders appointing emergency court monitors and would allow nonemergency court monitors to share the order as necessary during their investigation.

Senate professional staff also recommended that the Legislature consider deleting the reference to "court determinations relating to a finding of no probable cause" in the public-records exemption relating to determinations and orders finding no probable cause. In practice, the probable cause determination is reduced to a written order. Therefore, the exemption could provide that an "order finding no probable cause" is confidential and exempt from public disclosure.

III. Effect of Proposed Changes:

This bill is the result of the Judiciary Committee's Open Government Sunset Review of the public-records exemptions for certain court records relating to court monitors in guardianship proceedings found in s. 744.1076, F.S. These public-records exemptions stand repealed on October 2, 2011, unless reenacted by the Legislature.

[56] *Id.*
[57] Materials gathered for this Open Government Sunset Review are on file with the Senate Committee on Judiciary.
[58] A public-records exemption must, among other criteria, protect information of a sensitive, personal nature or be necessary for the effective administration of a program. Section 119.15(6)(b), F.S.

The bill retains the exemptions and makes organizational changes to the statute for clarity. The bill removes the confidential status of court orders appointing nonemergency court monitors for consistency and to allow nonemergency court monitors to share the order with others as necessary to aid in the monitor's investigation. However, under the bill, these orders would retain their current exempt status.

Additionally, the bill removes a reference to "court determinations relating to a finding of no probable cause" in the public-records exemption relating to determinations and orders finding no probable cause because, in practice, the probable cause determination is typically contained in a written order included in the guardianship file. In effect, the bill simplifies the exemption by clearly stating that any order finding no probable cause will be confidential and exempt from public disclosure.

The bill provides an effective date of October 1, 2011.

Other Potential Implications:

If the Legislature chooses not to retain the public-records exemptions for orders and reports of court monitors, the exemptions will expire on October 2, 2011. Absent the exemptions, certain sensitive information pertaining to the guardian or the ward may be available to the public, and the court monitor's investigation may be impeded by the disclosure of the order appointing the court monitor.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill retains the existing public-records exemptions. This bill complies with the requirement of article I, section 24 of the Florida Constitution that the Legislature address public-records exemptions in legislation separate from substantive law changes.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.