

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 572

INTRODUCER: Judiciary Committee

SUBJECT: Open Government Sunset Review/Statewide Public Guardianship Office

DATE: February 21, 2011

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Maclure	JU	Pre-meeting
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

The bill saves from repeal the public-records exemption under section 744.7042(6), Florida Statutes, for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office. The exemption currently is scheduled for repeal on October 2, 2011, unless retained by the Legislature following a review under the Open Government Sunset Review Act.

This bill repeals section 2 of chapter 2006-179, Laws of Florida.

II. Present Situation:

Florida's Public-Records Laws

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 1892. In 1992, Florida voters approved an amendment to the State Constitution which 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 Act is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record¹ must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency² records are to be available for public inspection.

The Florida Supreme Court has interpreted the definition of “public record” to encompass all materials made or received by an agency in connection with official business which are “intended to perpetuate, communicate, or formalize knowledge.”³ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁴

Only the Legislature is authorized to create exemptions from open government requirements.⁵ 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 accomplish the stated purpose of the law.⁶ A bill enacting an exemption may not contain other substantive provisions, although it may contain multiple exemptions relating to one subject.⁷

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.⁸ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.⁹

¹ Section 119.011(12), F.S., defines “public records” to include “all documents, papers, letters, maps, books, tapes, photographs, film, 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.”

² Section 119.011(2), F.S., defines “agency” as “any state, county, district, authority, or municipal officer, department, division, 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.”

³ *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁴ *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979).

⁵ Article I, s. 24(c) of the State Constitution.

⁶ *Memorial Hospital-West Volusia, Inc. 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).

⁷ Article I, s. 24(c) of the State Constitution.

⁸ Attorney General Opinion 85-62, August 1, 1985.

⁹ *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), *review denied*, 589 So. 2d 289 (Fla. 1991).

Open Government Sunset Review Act

The Open Government Sunset Review Act¹⁰ provides for the systematic review of an exemption from the Public-Records Act in the fifth year after its enactment.¹¹ The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.¹² 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.¹³ 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;
- 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.¹⁴

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.¹⁵

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.¹⁶ If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created,¹⁷ then a public necessity statement and a two-thirds vote for passage are not required.

¹⁰ Section 119.15, F.S.

¹¹ Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a substantially amended exemption if the exemption is expanded to cover additional records. As with a new exemption, a substantially amended exemption is also subject to the five-year review.

¹² Section 119.15(6)(b), F.S.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Section 119.15(6)(a), F.S.

¹⁶ Article I, s. 24(c) of the State Constitution.

¹⁷ An example of an exception to a public-records exemption would be allowing another agency access to confidential or exempt records.

Guardianship

In 2006, the Florida Legislature significantly revised guardianship laws.¹⁸ A guardian is a court-appointed surrogate decision-maker to make personal or financial decisions for a minor or for an adult with mental or physical disabilities. Section 744.102(4), F.S., defines “guardian” to mean a person who has been appointed by the court to act on behalf of a ward’s person or property or both. A ward is defined as a person for whom a guardian has been appointed.¹⁹

The Statewide Public Guardianship Office appoints local public guardian offices, as required by s. 744.703, F.S., to provide guardianship services when persons do not have adequate income or assets to afford a private guardian and there is no willing relative or friend to serve. The Statewide Public Guardianship Office annually registers professional guardians²⁰ and reviews and approves instruction and training for professional guardians.²¹ The Statewide Public Guardianship Office has authority to administer the Joining Forces for Public Guardianship grant program.²²

Public-Records Exemption for Donors’ Identifying Information

The Legislature created public-records exemption for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office. Section 744.7082(6), F.S., provides that the identity of a donor or a prospective donor of money or property to the direct-support organization who wishes to remain anonymous, as well as all information identifying the donor or prospective donor, is confidential and exempt from the public-records law.

The Foundation for Indigent Guardianship (FIG or foundation) serves as the direct-support organization for the Statewide Public Guardianship Office and was incorporated in December 2005.²³ The foundation is a not-for-profit corporation that is organized and operated to conduct programs and activities; to raise funds; to request and receive grants, gifts, and bequests of moneys; to acquire, receive, hold, invest, and administer, in its own name, securities, funds, objects of value, or other property, real or personal; and to make expenditures to or for the direct or indirect benefit of the Statewide Public Guardianship Office.²⁴

The foundation is operated by a board of directors that meets monthly. The foundation has established the State of Florida Public Guardianship Pooled Special Needs Trust. The trust is marketed by the foundation, and the trust is the foundation’s primary vehicle for fundraising. The foundation retains funds it receives upon the death of a beneficiary of the trust.

The funds that the foundation raises supplement the budgets of the contracted public guardianship offices. In consultation with the Statewide Public Guardianship Office, the

¹⁸ See ch. 2006-178, Laws of Fla.

¹⁹ Section 744.102(22), F.S.

²⁰ Section 744.1083, F.S.

²¹ Section 744.1085(3), F.S.

²² See section 744.712, F.S., this grant program has not yet been funded.

²³ Department of Elderly Affairs Statewide Public Guardianship Office.

²⁴ Section 744.7082(1), F.S.

foundation awards one-time grants to the local public guardianship offices throughout the state upon its receipt of retained funds from the trust. The foundation also participates in other outreach activities, such as submitting articles for publication in local media and participating in local community events to raise awareness of the Statewide Public Guardianship Office.

Public-records exemptions for the identities of donors or prospective donors who desire anonymity are comparatively common under the Florida Statutes.²⁵ The exemption provided to the foundation, the direct support organization for the Statewide Public Guardianship Office, affects donors or prospective donors of the foundation who desire to remain anonymous. The confidentiality applies to any record revealing the identity of such donors. This exemption is scheduled to expire on October 2, 2011, unless saved from repeal by the Legislature after a review under the Open Government Sunset Review Act, which was conducted by the Committee on Judiciary during the 2010-2011 legislative interim period.

Research from the review demonstrates that the public-records exemption enables the foundation to effectively and efficiently administer its fundraising activities on behalf of the local public guardianship offices that contract with the Statewide Public Guardianship Office to provide guardianship services. To the extent that donors might be dissuaded from contributing to the foundation in the absence of the public-records exemption, the ability of the foundation to raise funds would be limited. The authorizing statute for the foundation as a direct-support organization for the Statewide Public Guardianship Office provides that one of the foundation's purposes is to raise funds and receive gifts and property.

It is possible that a future donor to the foundation might desire anonymity. If the public-records exemption was not in place and a donor requested anonymity, the foundation could be forced to forgo or postpone the donation and request a public-records exemption from the Legislature.

According to staff of the Statewide Public Guardianship Office, there has been one corporate donor providing funds to the foundation, and it has no documented requests for anonymity. The foundation has not been directly soliciting donors for contributions other than the marketing of the State of Florida Public Guardianship Pooled Special Needs Trust. The foundation's board is developing a policy for a process by which a donor may request anonymity.

The Statewide Public Guardianship Office has indicated in response to a questionnaire that the public-records exemption is needed to protect the identity of donors participating in the foundation's trust because if the anonymity of the donors cannot be guaranteed, an individual may choose to donate to a trust or other charity that is not subject to such disclosures. The Statewide Public Guardianship Office has stated that the foundation is in the process of adopting a plan to expand its fundraising efforts and that it would be in the foundation's best interest to be able to offer anonymity to those prospective donors who desire it. The Statewide Public Guardianship Office additionally has stated that future fundraising efforts may be hampered if the identities of its donors were made public.

²⁵ See, e.g., Enterprise Florida, Inc. (s. 11.45(3)(i), F.S.); Cultural Endowment Program (s. 265.605(2), F.S.); Publicly owned house museum designated as a National Historic Landmark (s. 267.076, F.S.); direct-support organizations for University of West Florida (s. 267.1732(8), F.S.); direct-support organization for University of Florida (s. 267.1736, F.S.); Florida Tourism Industry Marketing Corporation (s. 288.1226(6), F.S.); direct-support organization for Office of Tourism, Trade and Economic Development (s. 288.12295, F.S.); and Florida Intergovernmental Relations Foundation (s. 288.809(4), F.S.).

Based on the research conducted as part of the Open Government Sunset Review, professional staff of the Committee on Judiciary recommends that the Legislature reenact the public-records exemption in s. 744.7082(6), F.S., which makes the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office exempt from disclosure. The exemption enables the foundation to effectively administer its programs, and thereby satisfies one of the recognized criteria for retaining an exemption as prescribed in the Open Government Sunset Review Act.²⁶

III. Effect of Proposed Changes:

Section 744.7082(6), F.S., provides that the identity of a donor or a prospective donor of money or property to the direct-support organization affiliated with the Statewide Public Guardianship Office, who wishes to remain anonymous, as well as all information identifying the donor or prospective donor, is confidential and exempt from the public-records law. Under section 2 of chapter 2006-179, Laws of Florida, this public-records exemption is subject to the Open Government Sunset Review Act and will repeal on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill repeals section 2 of chapter 2006-179, Laws of Florida, and thus saves the public-records exemption from repeal under the Open Government Sunset Review Act.

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

Other Potential Implications:

If the Legislature chooses not to retain the public-records exemption for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office, the exemption will expire on October 2, 2011. Without the exemption, the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office will become public.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill repeals section 2 of chapter 2006-179, Laws of Florida, and saves the public-records exemption under subsection 744.7042(6), F.S., for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office from repeal under the Open Government Sunset Review Act.

²⁶ Section 119.15(6)(b), F.S.

This legislation is not expanding the public records exemption under review to include more records; therefore, a two-thirds vote is not necessary.²⁷

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

²⁷ Article I, s. 24(c) of the State Constitution requires legislation creating a public-records exemption to pass by a two-thirds vote of each house in the Legislature.