

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 943 Public Records Exemption  
**SPONSOR(S):** Schwartz  
**TIED BILLS:** HB 941 **IDEN./SIM. BILLS:** SB 610

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N	Arguelles	Bond
2) Government Operations Subcommittee	10 Y, 0 N	Williamson	Williamson
3) Judiciary Committee			

### SUMMARY ANALYSIS

Litigation settlement agreements in guardianship cases routinely include a provision that the terms will be held in confidence by all parties. Because an adult may settle a lawsuit without court approval, those confidentiality clauses are effective and enforceable. However, a minor cannot settle a case valued in excess of \$15,000 without court approval. The court approval process requires a petition setting forth the terms of the settlement. An order is eventually entered that also may contain the terms of settlement, or may refer to the petition. The petition and the order are part of a court file, and therefore, are a matter of public record and open for inspection under current law.

The bill amends the guardianship law to provide that the petition requesting permission for settlement of a claim, the order on the petition, and any document associated with the settlement, are confidential and exempt from public records requirements. The court may order partial or full disclosure of the confidential and exempt record upon a showing of good cause.

The bill provides for repeal of the exemption on October 2, 2018, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

The bill provides that the exemption will take effect on the same date as House Bill 941 or similar legislation if such legislation is adopted in the same legislative session, or an extension thereof, and becomes law.

**Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands the current public record exemption for certain information related to guardianship; thus, it requires a two-thirds vote for final passage.**

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. 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.<sup>1</sup>

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act<sup>2</sup> provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- 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 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.
- Protects trade or business secrets.

As to this bill, the Open Government Sunset Review Act is, by its terms, advisory only, as the Act does not apply to court records.<sup>3</sup>

##### Court Records

Florida courts have consistently held that the judiciary is not an "agency" for purposes of Ch. 119, F.S.<sup>4</sup> However, the Florida Supreme Court found that "both civil and criminal proceedings in Florida are public events" and that the court will "adhere to the well-established common law right of access to court proceedings and records."<sup>5</sup> There is a Florida constitutional guarantee of access to judicial records.<sup>6</sup> The constitutional provision provides for public access to judicial records, except for those records expressly exempted by the State 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.<sup>7</sup>

##### Confidential versus Confidential and Exempt

There is a difference between records the legislature has determined to be exempt and those which have been determined to be confidential and exempt.<sup>8</sup> If the legislature has determined the information to be confidential then the information is not subject to inspection by the public.<sup>9</sup> Also, if the information is deemed to be confidential it may only be released to those person and entities designated in the

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<sup>1</sup> Art I., s. 24(c), Fla. Const.

<sup>2</sup> See s. 119.15, F.S.

<sup>3</sup> Section 119.15(2)(b), F.S.

<sup>4</sup> See e.g., *Times Publishing Company v. Ake*, 660 So. 2d 255 (Fla. 1995).

<sup>5</sup> *Barron v. Florida Freedom Newspapers*, 531 so. 2d 113, 116 (Fla. 1988).

<sup>6</sup> Fla. Const. art. I, s. 24(a).

<sup>7</sup> Fla. Const. art. I, ss. 24(c) and (d).

<sup>8</sup> *WFTV, Inc. v. School Board of Seminole County*, 874 So. 2d 48, 53 (Fla. 5<sup>th</sup> DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).

<sup>9</sup> *Id.*

statute.<sup>10</sup> However, the agency is not prohibited from disclosing the records in all circumstances where the records are only exempt.<sup>11</sup>

### Settlements in Guardianship Cases

Litigation settlement agreements routinely include a provision that the terms will be held in confidence by all parties. Because an adult may settle a lawsuit without court approval, those confidentiality clauses are effective and enforceable. However, a minor cannot settle a case valued in excess of \$15,000 without court approval.<sup>12</sup> The court approval process requires a petition setting forth the terms of the settlement.<sup>13</sup> An order is eventually entered that also may contain the terms of settlement, or may refer to the petition.<sup>14</sup> The petition and the order are part of a court file, and therefore, are a matter of public record and open for inspection under current law.

### **Effect of the Bill**

The bill amends s. 744.3701, F.S., to provide that any court record relating to the settlement of a ward's or minor's claim, including a petition for approval of a settlement on behalf of a ward or minor, a report of a guardian ad litem relating to a pending settlement, or an order approving a settlement on behalf of a ward or minor, is confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution and may not be disclosed except as specifically authorized.

Because the record is made confidential and exempt, it may not be disclosed except as provided in law. Current law allows the court, the clerk of court, the guardian and the guardian's attorney to review the guardianship court file. The bill amends s. 744.3701, F.S., to provide that record of a settlement may also be disclosed to the guardian ad litem (if any) related to the settlement, to the ward (the minor) if he or she is 14 years of age or older and has not been declared incompetent, and to the attorney for the ward. The record may also be disclosed as ordered by the court.

The exemption is repealed on October 2, 2018, unless reviewed and saved from repeal.

The bill includes a public necessity statement.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 744.3701, F.S., regarding confidentiality.

Section 2 provides a public necessity statement.

Section 3 provides for an effective date to coincide with passage of House Bill 941, if adopted in the same legislative session.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

##### **1. Revenues:**

The bill does not appear to have any impact on state revenues.

##### **2. Expenditures:**

The bill does not appear to have any impact on state expenditures.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

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<sup>10</sup> *Id.*

<sup>11</sup> See *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>12</sup> See s. 744.301(2), F.S.

<sup>13</sup> Section 744.387, F.S.

<sup>14</sup> *Id.*

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

Like any other public records exemption, the bill may lead to a minimal fiscal impact on the affected portions of the government, in this case, the court system and clerks of court. Staff responsible for complying with public record requests could require training related to expansion of the public record exemption, and court and clerk offices could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of the court system and clerks.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Vote Requirement

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands a public record exemption related to guardianships; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill expands a public record exemption related to guardianships; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption related to guardianships. The exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for executive branch rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments: Compliance with the Open Government Sunset Review Act

It is unclear why the bill complies with the Open Government Sunset Review Act, as the Act does not apply to court records.<sup>15</sup> The repeal in 2018 not only repeals the amendments made by this bill but also repeals existing public records exemptions that would not otherwise generally be subject to the Open Government Sunset Review Act<sup>16</sup> if such Act applied to court records.

The Open Government Sunset Review Act places several requirements on many bills that would create or expand a public records exemption. Although it purports to be mandatory, it is important to note that nothing in the Constitution allows a previous Legislature to bind the actions of this Legislature. As such, the Act is advisory, not mandatory; and while this bill appears to comply with the Act, the bill if passed would be valid even if it did not comply with the Act.

Other Comments: Chapter 119, F.S.

The bill provides that certain guardianship records are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution; however, court records are not subject to chapter 119, F.S. As such, reference to s. 119.07(1), F.S., appears unnecessary, unless the exemption also applies to official records in addition to court records.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.

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<sup>15</sup> Section 119.15(2)(b), F.S.

<sup>16</sup> See s. 119.15, F.S.