

**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.)

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Prepared By: The Professional Staff of the Committee on Children, Families, and Elder Affairs

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BILL: SB 1408

INTRODUCER: Senator Broxson

SUBJECT: Public Records/Confidentiality/Department of Elderly Affairs

DATE: March 24, 2017

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hendon	Hendon	CF	<b>Favorable</b>
2.			GO	
3.			RC	

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**I. Summary:**

SB 1408 creates an exemption from the public records law for personal identifying information, personal health and financial records, and photographs and video recordings held by the Department of Elderly Affairs in connection with a complaint filed against or an investigation of a professional guardian. The exemption is subject to the Open Government Sunset Review Act and will be repealed on October 2, 2022 unless reviewed and saved by the Legislature.

The bill is not expected to have a fiscal impact on the state and has an effective date of July 1, 2017.

**II. Present Situation:**

**Guardianship**

Guardianship is a concept whereby a “guardian” acts for another, called a “ward,” whom the law regards as incapable of managing his or her own affairs due to age or incapacity. Guardianships are generally disfavored due to the loss of individual civil rights, and a guardian may be appointed only if the court finds there is no sufficient alternative to guardianship.

There are two main forms of guardianship: guardianship over the person or guardianship over the property, which may be limited or plenary.<sup>1</sup> For adults, a guardianship may be established when a person has demonstrated that he or she is unable to manage his or her own affairs. If the adult is competent, this can be accomplished voluntarily. However, in situations where an individual’s mental competence is in question, an involuntary guardianship may be established through the adjudication of incompetence which is based on the determination of a court appointed examination committee.<sup>2</sup>

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<sup>1</sup> See generally, Section 744.102(9), F.S.

<sup>2</sup> See generally, Section 744.102(12), F.S.

Florida courts have long recognized the relationship between a guardian and his or her ward as a classic fiduciary relationship.<sup>3</sup> A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of that relationship.<sup>4</sup> The most basic duty of a fiduciary is the duty of loyalty: a fiduciary must refrain from self-dealing, must not take unfair advantage of the ward, must act in the best interest of the ward, and must disclose material facts.<sup>5</sup> In addition to the duty of loyalty, a fiduciary also owes a duty of care to carry out its responsibilities in an informed and considered manner.

Section 744.362, F.S., imposes specific duties upon a guardian consistent with the basic duties of a fiduciary including protecting and preserving the property of the ward's overall physical and social health. A guardian must file with the court an initial guardianship report,<sup>6</sup> an annual guardianship report,<sup>7</sup> and an annual accounting of the ward's property.<sup>8</sup> The reports provide evidence of the guardian's faithful execution of his or her fiduciary duties.<sup>9</sup>

In 2016, the Legislature passed and the Governor signed, CS/SB 232 to expand and rename the Statewide Public Guardianship Office within the Department of Elder Affairs (DOEA) as the Office of Public and Professional Guardians.<sup>10</sup> In its new capacity, the office is given authority to regulate professional guardians. The office is to establish standards of practice for public and professional guardians, receive and investigate complaints, establish procedures for disciplinary oversight, conduct hearings, and take administrative action pursuant to ch. 120, F.S. In conducting these investigations, the office may need to review and possess identifying information of an individual ward.

### **Public Records Law**

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>11</sup> This applies to the official business of any public body, officer or employee of the state, including all three branches of state government, local governmental entities and any person acting on behalf of the government.<sup>12</sup>

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<sup>3</sup> *Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st DCA 1990).

<sup>4</sup> *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002).

<sup>5</sup> *Capital Bank v. MVP, Inc.* 644 So. 2d 515, 520 (Fla. 3d DCA 1994).

<sup>6</sup> Section 744.362, F.S.

<sup>7</sup> Section 744.367, F.S.

<sup>8</sup> Section 744.3678, F.S.

<sup>9</sup> Section 744.368(1), F.S.

<sup>10</sup> Ch. 2016-40, Laws of Florida

<sup>11</sup> FLA. CONST., art. I, s. 24(a).

<sup>12</sup> FLA. CONST., art. I, s. 24(a).

In addition to the Florida Constitution, the Florida Statutes provides that the public may access legislative and executive branch records.<sup>13</sup> Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.<sup>14</sup> The Public Records Act states that:

it is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.<sup>15</sup>

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>16</sup> The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”<sup>17</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>18</sup>

The Legislature may create an exemption to public records requirements.<sup>19</sup> An exemption must pass by a two-thirds vote of the House and the Senate.<sup>20</sup> In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>21</sup> A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.<sup>22</sup>

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’<sup>23</sup> Records designated as ‘confidential and exempt’ may

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<sup>13</sup> The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

<sup>14</sup> Public records laws are found throughout the Florida Statutes.

<sup>15</sup> Section 119.01(1), F.S.

<sup>16</sup> Section 119.011(12), F.S., defines “public record” 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.” Section 119.011(2), F.S., defines “agency” to mean as “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>17</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>18</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>19</sup> FLA. CONST., art. I, s. 24(c).

<sup>20</sup> FLA. CONST., art. I, s. 24(c).

<sup>21</sup> FLA. CONST., art. I, s. 24(c).

<sup>22</sup> *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So.2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

<sup>23</sup> If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

be released by the records custodian only under the circumstances defined by the Legislature. Records designated as ‘exempt’ may be released at the discretion of the records custodian.<sup>24</sup>

Currently, s. 119.071(2), F.S., provides public record exemptions for information related to agency investigations. Information that is exempt or confidential and exempt from public record requirements includes information related to complaints of discrimination, information related to complaints of misconduct, and information revealing the identity of a victim of certain crimes.

### **Open Government Sunset Review Act**

In addition to the constitutional requirements relating to the enactment of a public records exemption, the Legislature may subject the new or broadened exemption to the Open Government Sunset Review Act (OGSR).

The OGSR prescribes a legislative review process for newly created or substantially amended public records.<sup>25</sup> The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.<sup>26</sup> In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

Under the OGSR the purpose and necessity of reenacting the exemption are reviewed. The Legislature must consider the following questions during its review of an exemption:<sup>27</sup>

- 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?

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.<sup>28</sup> If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are not required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless otherwise provided for by law.<sup>29</sup>

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<sup>24</sup> A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

<sup>25</sup> Section 119.15, F.S. According to s. 119.15(4)(b), F.S., a substantially amended exemption is one that is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S. The OGSR process is currently being followed, however, the Legislature is not required to continue to do so. The Florida Supreme Court has found that one legislature cannot bind a future legislature. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

<sup>26</sup> Section 119.15(3), F.S.

<sup>27</sup> Section 119.15(6)(a), F.S.

<sup>28</sup> FLA. CONST., art. I, s. 24(c).

<sup>29</sup> Section 119.15(7), F.S.

### III. Effect of Proposed Changes:

The bill creates s. 744.20042, F.S., to provide that certain personal identifying information, personal health and financial records, and photographs and video recordings held by the Department of Elderly Affairs in connection with a complaint filed or an investigation of a professional guardian is confidential and exempt from public record requirements.

The bill provides a public necessity statement as required by the State Constitution, specifying that it is a public necessity to protect personal identifying information contained in a complaint filed or an investigation of a professional guardian. The bill provides for repeal of the exemption on October 2, 2022, unless reviewed and reenacted by the Legislature.

The bill has an effective date of July 1, 2017.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

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

##### **Voting Requirement**

Article I, Section 24(c) of the Florida Constitution requires a two-thirds vote of each chamber for public records exemptions to pass.

##### **Breadth of Exemption**

Article I, Section 24(c) of the Florida Constitution requires a newly created public records exemption to be no broader than necessary to accomplish the state purpose of the law. The bill exempts certain identifying information contained in state agency investigations of complaints filed on a professional guardian. This bill appears to be no broader than necessary to accomplish the public necessity for this public records exemption.

#### 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. Statutes Affected:**

This bill creates section 744.20042 of the Florida Statutes.

**IX. Additional Information:**

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.