

**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 Rules

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BILL: SB 1408

INTRODUCER: Senator Broxson

SUBJECT: Public Records/Confidentiality/Department of Elderly Affairs

DATE: April 24, 2017

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hendon</u>	<u>Hendon</u>	<u>CF</u>	<b>Favorable</b>
2.	<u>Kim</u>	<u>Ferrin</u>	<u>GO</u>	<b>Favorable</b>
3.	<u>Hendon</u>	<u>Phelps</u>	<u>RC</u>	<b>Pre-meeting</b>

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**I. Summary:**

SB 1408 creates a public records exemption for certain information held by the Department of Elderly Affairs in connection with a complaint filed against or an investigation of a professional guardian.

The investigative information that is confidential and exempt indefinitely are: the names and identifying information of a ward and guardian; the ward's personal health and financial records; and all photographs and video recordings. All other investigative information become public once an investigation concludes.

The exemption is subject to the Open Government Sunset Review Act and will be repealed on October 2, 2022 unless reviewed and saved by the Legislature.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 a person or guardianship over 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>

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>3</sup> an annual guardianship report,<sup>4</sup> and an annual accounting of the ward's property.<sup>5</sup> The reports provide evidence of the guardian's faithful execution of his or her fiduciary duties.<sup>6</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 (office).<sup>7</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 collect identifying information, medical records and financial records.

### **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>8</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>9</sup>

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.<sup>10</sup> Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.<sup>11</sup> The Public Records Act states that

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

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

<sup>3</sup> Section 744.362, F.S.

<sup>4</sup> Section 744.367, F.S.

<sup>5</sup> Section 744.3678, F.S.

<sup>6</sup> Section 744.368(1), F.S.

<sup>7</sup> Ch. 2016-40, Laws of Florida

<sup>8</sup> FLA. CONST., art. I, s. 24(a).

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

<sup>10</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>11</sup> Public records laws are found throughout the Florida Statutes.

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>12</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>13</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>14</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>15</sup>

The Legislature may create an exemption to public records requirements.<sup>16</sup> An exemption must pass by a two-thirds vote of the House and the Senate.<sup>17</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>18</sup> A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.<sup>19</sup>

When creating a public records exemption, the Legislature may provide that a record is “confidential and exempt” or “exempt.”<sup>20</sup> Records designated as “confidential and exempt” may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as “exempt” are not required to be made available for public inspection, but may be released at the discretion of the records custodian under certain circumstances.<sup>21</sup>

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

The Open Government Sunset Review Act (referred to hereafter as the “OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open

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<sup>12</sup> Section 119.01(1), F.S.

<sup>13</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>14</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>15</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>16</sup> FLA. CONST., art. I, s. 24(c).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). See also *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004).

<sup>20</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).

<sup>21</sup> *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

meetings exemptions.<sup>22</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>23</sup>

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.<sup>24</sup> An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;<sup>25</sup>
- Releasing sensitive personal information would be defamatory or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;<sup>26</sup> or
- It protects trade or business secrets.<sup>27</sup>

The OGSR also requires specified questions to be considered during the review process.<sup>28</sup> In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>29</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 provided for by law.<sup>30</sup>

### III. Effect of Proposed Changes:

The bill creates s. 744.20042, F.S., which makes the following information in a complaint and investigation held by DOEA confidential and exempt from public disclosure indefinitely:

- A complainant's identity;

<sup>22</sup> Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it 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 section 119.15(2), F.S.

<sup>23</sup> Section 119.15(3), F.S.

<sup>24</sup> Section 119.15(6)(b), F.S.

<sup>25</sup> Section 119.15(6)(b)1., F.S.

<sup>26</sup> Section 119.15(6)(b)2., F.S.

<sup>27</sup> Section 119.15(6)(b)3., F.S.

<sup>28</sup> Section 119.15(6)(a), F.S. The specified questions are:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means?  
If so, how?
5. Is the record or meeting protected by another exemption?
6. Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

<sup>29</sup> FLA. CONST. art. I, s. 24(c).

<sup>30</sup> Section 119.15(7), F.S.

- A ward's identity, health information and financial records; and,
- All photographs and video records.

All other investigative information would become public when DOEA completes its investigation or the investigation ceases to be active. The bill provides that the DOEA may release confidential and records to the law enforcement, regulatory agencies, the clerk of court, and pursuant to a court order.

The bill provides a public necessity statement as required by the State Constitution, specifying that it is a public necessity to protect the identity of a complainant because revealing the identity of the complainant may damage their good name and the complainant could be put at risk of retaliation.

The bill also provides that investigative information should be exempt from public disclosure because an investigation could lead to legal action and the loss of a license. Releasing investigative information may also frustrate the purpose of an investigation and impair DOEA's ability to regulate guardians. The public necessity statement also provides that the records DOEA provides to law enforcement, regulatory agencies and clerks of court should maintain their confidential and exempt status. The bill itself does not expressly provide that the confidential and exempt status of investigative records travels with the records; the bill only provides that records are confidential and exempt when they are held by DOEA.

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.

###### **Public Necessity Statement**

Article I, Section 24(c) of the Florida Constitution requires a newly created public records exemption must "state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the state purpose of the law."

The bill exempts certain identifying information of a complainant contained in the DOEA's investigations of complaints filed on a professional guardian, which is supported by a public necessity statement.

Portions of the public exemption are not as well supported by public necessity statements. The bill does not provide a public necessity statement supporting the confidential and exempt status of the identity of the ward. The bill exempts the health and financial records of a ward, as well as photos and videos taken during the investigation, however, the specific necessity for the exemption are not apparent. Although the bill contains a general statement about investigatory information, the public necessity statement could be interpreted as lacking sufficient specificity.

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:**

The bill does not provide that records are confidential and exempt once they are transferred to law enforcement, regulatory agencies and the clerks of court, however the public necessity statement says that confidentiality travels with the documents.

**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.

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

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