

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 261 Pub. Rec. and Meetings/Elder Abuse Fatality Review Teams

**SPONSOR(S):** Watson

**TIED BILLS:** HB 259 **IDEN./SIM. BILLS:** SB 424

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	10 Y, 0 N	Gilani	Brazzell
2) Oversight, Transparency & Administration Subcommittee			
3) Health & Human Services Committee			

### SUMMARY ANALYSIS

Elder populations are vulnerable to abuse and exploitation due to risk factors associated with aging, such as physical and mental infirmities and social isolation. Abuse can have significant physical and emotional effects on an older adult and can lead to premature death.

Approximately 1 in 10 seniors is abused each year, and incidents of elder abuse are reported in 1 out of every 23 cases. Research suggests that elder abuse is underreported because the most common perpetrators of elder abuse are relatives, friends and neighbors, and home care aides, and victims fear retribution from or trust their perpetrators.

HB 261 creates a public records exemption for certain information that may be contained in a record created by an elder abuse fatality review team authorized in tied bill HB 259 or similar legislation. Specifically, the bill makes information revealing the identity of an elder abuse victim contained within a review team's records confidential and exempt from public disclosure. In addition, confidential or exempt information obtained by a review team retains its status and is also confidential or exempt from public disclosure.

If HB 259 or similar legislation passes, these review teams will review closed cases from its judicial circuit where the death of an elderly person was caused by or related to abuse. In its review, a review team obtains confidential and exempt records from public entities, as well as information identifying the victim of elder abuse.

The bill creates an exemption from public meetings requirements for portions of meetings wherein a review team discusses confidential or exempt information or information revealing the identity of an elder abuse victim.

The bill subjects the exemptions to review and repeal on October 2, 2023, pursuant to s. 119.15, F.S., the Open Government Sunset Review Act. The bill also provides a public necessity statement as required by the Florida Constitution.

The bill may create an insignificant, negative fiscal impact on state government for costs associated with training staff on a new public records exemption.

HB 261 will be effective on the same date that HB 259 or similar legislation takes effect.

**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 public record or public meeting exemption. The bill creates public record and public meeting exemptions; thus, it require a two-thirds vote for final passage.**

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. PRESENT SITUATION:

#### Public Records and Open Meetings Requirements

The Florida Constitution provides that the public has the right to access government records and meetings. The public may 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 of persons acting on their behalf.<sup>1</sup> The public also has a right to notice and access to meetings of any collegial public body of the executive branch of state government or of any local government.<sup>2</sup> The Legislature's meetings must also be open and noticed to the public, unless there is an exception provided for by the Constitution.<sup>3</sup>

In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. The Public Records Act<sup>4</sup> guarantees every person's right to inspect and copy any state or local government public record.<sup>5</sup> The Sunshine Law<sup>6</sup> requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken be noticed and open to the public.<sup>7</sup>

The Legislature may create an exemption to public records or open meetings requirements.<sup>8</sup> An exemption must specifically state the public necessity justifying the exemption<sup>9</sup> and must be tailored to accomplish the stated purpose of the law.<sup>10</sup> There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Public Records Act and also confidential.

#### ***Exempt Records***

If a record is exempt, the specified record or meeting, or portion thereof, is not subject to the access requirements of s. 119.07(1), F.S., s. 286.011, F.S., or article I, section 24 of the Florida Constitution. If records are only exempt from the Public Records Act and not confidential, the exemption does not prohibit the showing of such information, but simply exempts them from the mandatory disclosure requirements in s. 119.07(1)(a), F.S.<sup>11</sup>

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<sup>1</sup> FLA. CONST., art. I, s. 24(a).

<sup>2</sup> FLA. CONST., art. I, s. 24(b).

<sup>3</sup> FLA. CONST., art. I, s. 24(b).

<sup>4</sup> Ch. 119, F.S.

<sup>5</sup> Section 119.011(12), F.S., defines "public record" as 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" 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. The Public Records Act does not apply to legislative or judicial records, *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992), however, the Legislature's records are public pursuant to s. 11.0431, F.S.

<sup>6</sup> S. 286.011, F.S.

<sup>7</sup> S. 286.011(1)-(2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in the Florida Constitution. Article III, section 4(e) of the Florida Constitution provide that legislative committee meetings must be open and noticed to the public. In addition, prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.

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

<sup>9</sup> FLA. CONST., art. I, s. 24(c).

<sup>10</sup> FLA. CONST., art. I, s. 24(c).

<sup>11</sup> See, *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991), rev. denied, 589 So. 2d 289 (Fla. 1991), in which the court observed that pursuant to s. 119.07(3)(d), F.S., [now s. 119.071(2)(c), F.S.] "active criminal investigative information" was exempt from the requirement that public records be made available for public inspection. However, as stated by the court, "the exemption does not prohibit the showing of such information." *Id.* at 686.

## ***Confidential Records***

The term “confidential” is not defined in the Public Records Act; however, it is used in Article I, S. 24 of the Florida Constitution, which provides that every person has the right to inspect or copy any public record, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. If information is made confidential in the statutes, the information is not subject to inspection by the public and may be released only to those persons and entities designated in the statute.<sup>12</sup>

### Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.<sup>13</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>14</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>15</sup> An exemption serves an identifiable purpose if it meets one of the following criteria:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption; or
- 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; or
- It protects trade or business secrets.<sup>16</sup>

In addition, the Legislature must find that the identifiable public purpose is compelling enough to override Florida’s open government public policy and that the purpose of the exemption cannot be accomplished without the exemption.<sup>17</sup>

The OGSR also requires specific questions to be considered during the review process.<sup>18</sup> In examining an exemption, the OGSR asks the Legislature to 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>19</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 retain their exempt status unless provided for by law.<sup>20</sup>

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<sup>12</sup> *WFTV, Inc. v. School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004), rev. denied, 892 So. 2d 1015 (Fla. 2004). See also, 04-09 Fla Op. Att’y Gen. (2004) and 86-97 Fla Op. Att’y Gen. (1986).

<sup>13</sup> S. 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it 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.

<sup>14</sup> S. 119.15(3), F.S.

<sup>15</sup> S. 119.15(6)(b), F.S.

<sup>16</sup> S. 119.15(6)(b), F.S.

<sup>17</sup> S. 119.15(6)(b), F.S.

<sup>18</sup> S. 119.15(6)(a), F.S. The questions are: What specific records or meetings are affected by the exemption? Whom does the exemption uniquely affect, as opposed to the 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?

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

<sup>20</sup> S. 119.15(7), F.S.

## Elder Abuse

Elder populations are vulnerable to abuse and exploitation due to risk factors associated with aging, such as physical and mental infirmities and social isolation.<sup>21,22</sup> In Florida, almost one million senior citizens are medically underserved, and 1.6 million suffer from one or more disabilities.<sup>23</sup> According to the Department of Justice, approximately 1 in 10 seniors is abused each year in the United States, and incidents of elder abuse are reported to local authorities in 1 out of every 23 cases.<sup>24</sup> Elder abuse can have significant physical and emotional effects on an older adult and can lead to premature death.<sup>25</sup> Abused seniors are twice as likely to be hospitalized and three times more likely to die than non-abused seniors.<sup>26</sup>

Elder abuse occurs in community settings, such as private homes, as well as in institutional settings like nursing homes and other long-term care facilities. Prevalent forms of abuse are financial exploitation, neglect, emotional or psychological abuse, and physical abuse; however, an elder abuse victim will often experience multiple forms of abuse at the same time.<sup>27</sup> The most common perpetrators of elder abuse are relatives, such as adult children or a spouse, followed by friends and neighbors, and then home care aides.<sup>28</sup> Research shows that elder abuse is underreported, often because the victims fear retribution or care for or trust their perpetrators.<sup>29</sup> Elder abuse deaths are more likely to go undetected because an elder death is expected to occur, given age or infirmity, more so than other deaths due to abuse such as a child death or a death involving domestic violence.<sup>30</sup> Experts believe this may be one of the reasons elder abuse lags behind child abuse and domestic violence in research, awareness, and systemic change.<sup>31</sup>

## Elder Abuse Fatality Review Teams

The PCS for tied bill HB 259 authorizes the creation of a multidisciplinary, multiagency elder abuse fatality review team (EA-FRT) in each judicial circuit. Each EA-FRT reviews closed cases from its judicial circuit where the death of an elderly person was alleged or found to be caused by, or related to, abuse.

An EA-FRT can consist of representatives from public and private entities that deal with the study, treatment, investigation, or prevention of elder abuse, including but not limited to law enforcement agencies, health and social services agencies, healthcare practitioners, and nonprofit organizations.

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<sup>21</sup> NATIONAL CENTER ON ELDER ABUSE, *What are the Risk Factors?*, <https://ncea.acl.gov/whatwedo/research/statistics.html#risk> (last visited Jan. 4, 2018).

<sup>22</sup> U.S. DEPARTMENT OF JUSTICE, *Elder Justice Initiative*, <https://www.justice.gov/elderjustice> (last visited Nov. 19, 2017). See also, Xing Qi Dong et al., *Elder Abuse as a Risk Factor for Hospitalization in Older Persons*, JAMA INTERN MED. 173:10 at 911-917 (2013).

<sup>23</sup> DEPARTMENT OF ELDER AFFAIRS, *2016 Profile of Elder Floridians*, available at: [http://elderaffairs.state.fl.us/doea/pubs/stats/County\\_2016\\_projections/Counties/Florida.pdf](http://elderaffairs.state.fl.us/doea/pubs/stats/County_2016_projections/Counties/Florida.pdf) (last visited Nov. 24, 2017).

<sup>24</sup> U.S. DEPARTMENT OF JUSTICE, *Elder Justice Initiative*, available at: <https://www.justice.gov/elderjustice> (last visited Nov. 19, 2017). See also, Ron Acierno et al., *Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study*, 100:2 AM. J. PUB. HEALTH, at 292-297 (Feb. 2010), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2804623/> (last visited Jan. 3, 2018).

<sup>25</sup> U.S. DEPARTMENT OF JUSTICE, *Elder Justice Initiative*, <https://www.justice.gov/elderjustice> (last visited Nov. 19, 2017). See also, Mark S. Lachs et al., *The Mortality of Elder Mistreatment*, 280:5 JAMA at 428-432 (1998), available at: <https://jamanetwork.com/journals/jama/fullarticle/187817> (last visited Jan. 4, 2018).

<sup>26</sup> U.S. DEPARTMENT OF JUSTICE, *Elder Justice Initiative*, <https://www.justice.gov/elderjustice> (last visited Nov. 19, 2017). See also, Xing Qi Dong et al., *Elder Abuse as a Risk Factor for Hospitalization in Older Persons*, JAMA INTERN MED. 173:10 at 911-917 (2013).

<sup>27</sup> NATIONAL CENTER ON ELDER ABUSE, *Challenges in Elder Abuse Research*, available at: <https://ncea.acl.gov/whatwedo/research/statistics.html#challenges> (last visited Jan. 4, 2018).

<sup>28</sup> NATIONAL CENTER ON ELDER ABUSE, *Who are the Perpetrators?*, <https://ncea.acl.gov/whatwedo/research/statistics.html#perpetrators> (last visited Jan. 4, 2018).

<sup>29</sup> CENTER FOR DISEASE CONTROL AND PREVENTION, *Understanding Elder Abuse, Fact Sheet 2016*, available at: <https://www.cdc.gov/violenceprevention/pdf/em-factsheet-a.pdf> (last visited Jan. 4, 2018).

<sup>30</sup> U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, *Elder Justice Roundtable Report: Medical Forensic Issues Concerning Abuse and Neglect*, October 18, 2000, p. 8, available at: <https://www.ncjrs.gov/pdffiles1/nij/242221.pdf> (last visited Jan. 4, 2018).

<sup>31</sup> Id. at pp. 7-10.

In its review of an elderly person's death alleged or found to have been caused by, or related to, abuse or neglect, an EA-FRT obtains records and information pertaining to the elderly person and the surrounding circumstances of his or her death. Specifically, an EA-FRT may obtain public records from criminal justice agencies and the medical examiner's office, as well as information otherwise publicly available or voluntarily supplied by the victim's family. The PCS for tied bill HB 259 also authorizes an EA-FRT to obtain confidential and exempt records from the Department of Children and Families' adult protective investigations.

These records may contain confidential or exempt information or information that reveals the identity of the victim. EA-FRTs may also create new records containing this information or discuss this information during their review meetings.

### Adult Protective Services Records

Chapter 415, F.S., creates the state's Adult Protective Services system under the Department of Children and Families (DCF). DCF protects vulnerable adults,<sup>32</sup> including elders, from abuse, neglect, and exploitation<sup>33</sup> through mandatory reporting and investigation of suspected abuse. This includes deaths allegedly due to abuse or neglect. During the investigation of a death, DCF obtains, among other things, medical records, the death certificate, the autopsy report, and any related law enforcement investigations and criminal records. In order to protect the rights of the vulnerable adult or related individuals, s. 415.107, F.S., makes confidential and exempt all records created by these reports and investigations involving vulnerable adults.

The PCS for tied bill HB 259 narrows this exemption, granting EA-FRTs access to these records.

### Florida's Existing Fatality Review Systems

Currently, Florida has child abuse death review (CADR) committees and domestic violence fatality review teams (DV-FRTs), which are multidisciplinary teams at the state and local levels.<sup>34,35</sup> Respectively, these teams review the surrounding circumstances of child deaths reported to DCF's central abuse hotline<sup>36</sup> and fatal or near-fatal incidents of domestic violence and suicide.<sup>37</sup> Their purpose is to identify any gaps in the systems serving these populations and make recommendations to prevent abuse-related deaths.<sup>38</sup>

Sections 383.402(5), F.S., and 741.316(2), F.S., respectively allow CADR committees and DV-FRTs to obtain otherwise confidential or exempt information or other sensitive information, including the identity of victims or surviving family members. The Legislature has granted both of these fatality review systems exemptions from the public records and meetings requirements. Specifically, records obtained or created by a CADR committee which contain information revealing the identity of a child abuse victim or the identity of a surviving family member are confidential and exempt from public disclosure.<sup>39</sup> Similarly, s. 383.412(3), F.S., permits closure of portions of a CADR committee meeting wherein this confidential and exempt information is discussed.

Records created by a DV-FRT which contain information revealing the identity of a domestic violence victim or the identity of any surviving children are confidential and exempt from public disclosure.<sup>40</sup> Additionally, if these review teams obtain records that are otherwise confidential or exempt, they retain their status when held by the review teams and are not subject to public disclosure.<sup>41</sup> If any of this

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<sup>32</sup> A vulnerable adult is a person 18 years of age or older whose ability to perform normal activities of daily living or to provide for his or her own care or protection is impaired due to mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging, s. 415.102(28), F.S.

<sup>33</sup> S. 415.101(2), F.S.

<sup>34</sup> S. 383.402(1), F.S.

<sup>35</sup> S. 741.316(1), 741.316(2), F.S.

<sup>36</sup> S. 383.402(1), F.S.

<sup>37</sup> S. 741.316(2), F.S.

<sup>38</sup> S. 383.402(1), F.S.

<sup>39</sup> S. 383.412(2), F.S.

<sup>40</sup> S. 741.3165(1)(b), F.S.

<sup>41</sup> S. 741.3165(1)(a), F.S.

information is discussed during a DV-FRT meeting, then that portion of the meeting is exempt from public meeting requirements.<sup>42</sup>

## B. EFFECT OF PROPOSED CHANGES:

HB 261 creates a public records exemption in s. 415.1103, F.S., which would be established by the PCS for tied bill HB 259. Specifically, information contained within a record created by an EA-FRT which reveals the identity of an elder abuse victim is confidential and exempt from the public records requirements of s. 119.07(1), F.S., and article I, section 24(a) of the Florida Constitution. In addition, information in a record obtained by an EA-FRT that is otherwise confidential or exempt will retain its confidential or exempt status when obtained by an EA-FRT.

The bill also creates an exemption from the public meeting requirements of s. 286.11, F.S., and article I, section 24(b), of the Florida Constitution for portions of an EA-FRT meeting at which members discuss confidential or exempt information or the identity of an elder abuse victim.

The bill makes these exemptions subject to review and repeal on October 2, 2023, in accordance with s. 119.15, F.S., the Open Government Sunset Review Act.

The bill includes a public necessity statement as required by the Florida Constitution which states that the exemptions are necessary to protect sensitive personal information concerning an elder abuse victim. The public necessity statement further states that failure to make this information confidential and exempt would hamper the open communication and coordination among EA-FRT members that is essential for the success of the review process. The bill asserts that the harm substantially outweighs the public benefit achieved from disclosing this sensitive information.

Additionally, the bill finds closing portions of EA-FRT meetings where this confidential or exempt information is discussed a necessity because failure to do so would defeat the purpose of the public records exemption.

The bill takes effect on the same date that HB 259 or similar legislation takes effect, if such legislation is adopted in the same legislative session.

## C. SECTION DIRECTORY:

- Section 1:** Amends s. 415.1103, F.S., created by the PCS for tied bill HB 259, relating to elder abuse fatality review teams.
- Section 2:** Provides a public necessity statement.
- Section 3:** Provides a contingent effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

The bill may create an insignificant, negative fiscal impact on state agencies for costs associated with training staff on a new public records exemption and responding to public records requests.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

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<sup>42</sup> S. 741.3165(2), F.S.  
**STORAGE NAME:** h0261a.CFS  
**DATE:** 1/17/2018

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

Vote Requirement

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. **The bill creates new exemptions; thus, it requires a two-thirds vote for final passage.**

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates new exemptions; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the Florida 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 for portions of EA-FRT records that contain information which reveals an elder abuse victim's identity. The bill also creates a public meeting exemption and closes portions of an EA-FRT meeting where the identity of an elder abuse victim is discussed.

Additionally, the bill recognizes that otherwise confidential or exempt records or information will retain their confidential or exempt status when held by an EA-FRT and prohibits an EA-FRT from disclosing such record or information to the public or discussing such information during an open portion of an EA-FRT meeting.

The bill seeks to prevent sensitive personal information concerning victims of elder abuse from being released to the public and asserts that failure to do so would hamper open communication and coordination between the EA-FRT members.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rule-making or rule-making authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

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