

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

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

**SPONSOR(S):** Watson

**TIED BILLS:** CS/HB 259 **IDEN./SIM. BILLS:** CS/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	10 Y, 0 N	Hoffman	Harrington
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 259 (2018), which is tied to this bill, authorizes the creation of a multidisciplinary, multiagency elder abuse fatality review team (EA-FRT) in each judicial circuit. Each EA-FRT may review 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 may 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. In a review of an elderly person's death alleged or found to have been caused by, or related to, abuse or neglect, an EA-FRT may obtain 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. HB 259 also authorizes an EA-FRT to obtain confidential and exempt records from the Department of Children and Families.

This bill creates a public records exemption for information contained in a record created by an elder abuse fatality review team that reveals the identity of an elder abuse victim. Specifically, the bill makes such information confidential and exempt from public disclosure. In addition, the bill provides that confidential or exempt information obtained by a review team retains its status when held by an elder abuse fatality review team. The bill also creates an exemption from public meetings requirements for portions of meetings wherein a elder abuse fatality review team discusses confidential or exempt information or information revealing the identity of an elder abuse victim.

The bill provides for repeal of the exemptions on October 2, 2023, unless reviewed and saved from repeal through reenactment by the Legislature. The bill also provides a public necessity statement as required by the Florida Constitution.

The bill may have a minimal fiscal impact on the state. See Fiscal Comments.

**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 or expanded 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.**

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0261c.OTA

DATE: 1/30/2018

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

###### 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 guarantees every person's right to inspect and copy any state or local government public record.<sup>4</sup> The Sunshine Law 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>5</sup>

The Legislature may create an exemption to public records or open meetings requirements.<sup>6</sup> An exemption must specifically state the public necessity justifying the exemption and must be tailored to accomplish the stated purpose of the law.<sup>7</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>8</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>9</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> 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). The Legislature's records are public under s. 11.0431, F.S.

<sup>5</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>6</sup> FLA. CONST., art. I, s. 24(c).

<sup>7</sup> FLA. CONST., art. I, s. 24(c).

<sup>8</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>9</sup> S. 119.15(3), F.S.

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>10</sup> The identifiable public purpose must be compelling enough to override Florida's open government public policy and that the purpose of the exemption cannot be accomplished without the exemption.<sup>11</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>12</sup>

### *Confidential versus Confidential and Exempt*

When creating a public record exemption, the Legislature designates the record as "exempt" or "confidential and exempt." There is a difference between records the Legislature has designated as exempt and those designated as confidential and exempt. A record that is designated as confidential and exempt may only be released by the records custodian to those persons or entities designated in statute.<sup>13</sup> However, records designated as exempt may be disclosed under certain circumstances and does not impose a secrecy requirement which bars a custodian from displaying a public record entirely of his or her own volition.<sup>14</sup>

### 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>15</sup> In Florida, over 920,000 senior citizens are medically underserved, and over 1.5 million suffer from one or more disabilities.<sup>16</sup> Approximately 1 in 10 seniors is abused each year in the United States, and incidents of elder abuse are underreported, with local authorities being notified in 1 out of every 23 cases.<sup>17</sup> Elder abuse can have significant physical and emotional effects on an older adult and can lead to premature death.<sup>18</sup> Abused seniors are twice as likely to be hospitalized and three times more likely to die than non-abused seniors.<sup>19</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,

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<sup>10</sup> S. 119.15(6)(b), F.S.

<sup>11</sup> S. 119.15(6)(b), F.S.

<sup>12</sup> S. 119.15(6)(b), F.S.

<sup>13</sup> *WFTV, Inc. v. School Board of Seminole County*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).

<sup>14</sup> *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991) (holding active criminal investigative information exempt from the requirement that public records be made available for public inspection, but does not prohibit the showing of such information).

<sup>15</sup> NATIONAL CENTER ON ELDER ABUSE, *What are the Risk Factors?*, <https://ncea.acl.gov/whatwedo/research/statistics.html#risk> (last visited Jan. 25, 2018); *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), available at <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/1675876>.

<sup>16</sup> DEPARTMENT OF ELDER AFFAIRS, *2016 Profile of Elder Floridians*, [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 Jan. 25, 2018).

<sup>17</sup> U.S. DEPARTMENT OF JUSTICE, *Elder Justice Initiative*, <https://www.justice.gov/elderjustice> (last visited Jan. 25, 2018). *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/>.

<sup>18</sup> U.S. DEPARTMENT OF JUSTICE, *supra*; *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>.

<sup>19</sup> U.S. DEPARTMENT OF JUSTICE, *supra*; *See also*, Xing Qi Dong, *supra*.

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>20</sup> The most common perpetrators of elder abuse are relatives, followed by friends and neighbors, and then home care aides.<sup>21</sup> Research shows that elder abuse is underreported, often because the victims fear retribution or care for or trust their abusers.<sup>22</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>23</sup> Experts believe this may be why elder abuse lags behind child abuse and domestic violence in research, awareness, and systemic change.<sup>24</sup>

### 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>25</sup> These teams review the circumstances of child deaths reported to the Department of Children and Families' (DCF) central abuse hotline and fatal or near-fatal incidents of domestic violence and suicide, respectively.<sup>26</sup> Their purpose is to identify gaps in the systems serving these populations and make recommendations to prevent abuse-related deaths.<sup>27</sup>

Sections 383.402(5) and 741.316(2), F.S., respectively, allow CADR committees and DV-FRTs to obtain 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>28</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>29</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>30</sup> If any of this information is discussed during a DV-FRT meeting, then that portion of the meeting is exempt from public meeting requirements.<sup>31</sup>

### HB 259 (2018) - Elder Abuse Fatality Review Teams

HB 259 (2018), which is tied to this bill, authorizes the creation of a multidisciplinary, multiagency elder abuse fatality review team (EA-FRT) in each judicial circuit. Each EA-FRT may review closed cases

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<sup>20</sup> NATIONAL CENTER ON ELDER ABUSE, *Challenges in Elder Abuse Research*, <https://ncea.acl.gov/whatwedo/research/statistics.html> (last visited Jan. 25, 2018).

<sup>21</sup> *Id.*

<sup>22</sup> CENTER FOR DISEASE CONTROL AND PREVENTION, *Understanding Elder Abuse, Fact Sheet 2016*, <https://www.cdc.gov/violenceprevention/pdf/em-factsheet-a.pdf> (last visited Jan. 25, 2018).

<sup>23</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. 25, 2018).

<sup>24</sup> *Id.* at 7-10.

<sup>25</sup> S. 383.402(1), F.S.; ss. 741.316(1)-(2), F.S.

<sup>26</sup> S. 383.402(1), F.S.; S. 741.316(2), F.S.

<sup>27</sup> S. 383.402(1), F.S.

<sup>28</sup> S. 383.412(2), F.S.

<sup>29</sup> S. 741.3165(1)(b), F.S.

<sup>30</sup> S. 741.3165(1)(a), F.S.

<sup>31</sup> S. 741.3165(2), F.S.

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 may 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.

In a review of an elderly person's death alleged or found to have been caused by, or related to, abuse or neglect, an EA-FRT may obtain 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. HB 259 also authorizes an EA-FRT to obtain confidential and exempt records from the DCF's 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.<sup>32</sup>

#### *Adult Protective Services Records*

Chapter 415, F.S., creates the state's Adult Protective Services system under DCF. DCF protects vulnerable adults,<sup>33</sup> including elders, from abuse, neglect, and exploitation<sup>34</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. HB 259 narrows this exemption, granting EA-FRTs access to these records.

#### **Effect of Proposed Changes**

The bill creates a public records exemption in s. 415.1103, F.S., for information contained within a record created by an EA-FRT, which reveals the identity of an elder abuse victim. The bill provides that such information is confidential and exempt from the public records requirements. Furthermore, information in a record obtained by an EA-FRT that is otherwise confidential or exempt will retain its confidential or exempt status when held by an EA-FRT. The bill also creates an exemption from the public meeting requirements 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 provides for repeal of the exemptions on October 2, 2023, in accordance with s. 119.15, F.S., the OGSR, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill includes a public necessity statement as required by the Florida Constitution. The bill finds the exemptions are necessary to protect the identity of an elder abuse victim, and failure to make this information confidential and exempt would hamper 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.

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<sup>32</sup> Florida House of Representatives, Analysis of 2018 House Bill 259, p. 1 (Jan. 17, 2018).

<sup>33</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>34</sup> S. 415.101(2), F.S.

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 (2018) or similar legislation takes effect, if such legislation is adopted in the same legislative session.

**B. SECTION DIRECTORY:**

**Section 1:** Amends s. 415.1103, F.S., created by HB 259, relating to elder abuse fatality review teams.

**Section 2:** Provides a public necessity statement.

**Section 3:** Provides an effective date that is contingent upon the passage of HB 259 or similar legislation.

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

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

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

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

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

The bill could have a minimal fiscal impact on agencies because agency staff responsible for complying with public record requests may require training related to the expansion of the public record exemption. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of agencies.

### 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 or expanded public record or public meeting exemption. The bill creates a public record and public meeting exemption; 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:

HB 259 pertains to cases where a death was alleged or found to have been caused by elder abuse. Currently, this bill only makes the identity of "victims" confidential and exempt, but it does not protect the identity of any alleged victims.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.