

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.)

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: SB 7000

INTRODUCER: Children, Families, and Elder Affairs Committee

SUBJECT: OGSR/Current or Former Public Guardians

DATE: March 28, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Delia</u>	<u>Cox</u>		CF Submitted as Committee Bill
1.	<u>McVaney</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
2.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 7000 saves from repeal the current public records exemption in s. 744.21031, F.S., by maintaining certain provisions of the exemption as in current law and narrowing the exemption by allowing certain information that is currently exempt to become available for public disclosure. Specifically, the bill continues the exemptions from public disclosure for certain identifying and location information held by an agency pertaining to:

- Current and former public guardians;
- Employees with fiduciary responsibility; and
- Spouses and children of current and former public guardians and employees with fiduciary responsibility.

The bill expands public access to information by removing the exempt status of photographs of current public guardians. The bill also removes the exempt status of places of employment of current or former public guardians, current or former employees with fiduciary duty, and the spouses and children of such persons.

The public records exemption stands repealed on October 2, 2023, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act. The bill removes the scheduled repeal of the exemption to continue exempt status of the information.

The bill is effective October 1, 2023.

II. Present Situation:

Public Records Law

The State Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ 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 who acts on behalf of the government.²

Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.³ The Public Records Act states that:

[i]t 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.⁴

The Public Records Act typically contains general exemptions that apply across agencies. Agency- or program-specific exemptions often are placed in the substantive statutes that relate to that particular agency or program.

The Public Records Act does not apply to legislative or judicial records.⁵ Legislative records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are codified primarily in s. 11.0431(2)-(3), F.S., and adopted in the rules of each house of the legislature.

Section 119.011(12), F.S., defines “public records” to include:

[a] ll 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 connections with the transaction of official business by any agency.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to “perpetuate, communicate, or formalize knowledge of some type.”⁶

The Florida Statutes specify conditions under which public access to governmental records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any state or local government public record at any reasonable time, under reasonable conditions, and

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

³ Public records laws are found throughout the Florida Statutes.

⁴ Section 119.01(1), F.S.

⁵ *Locke v. Hawkes*, 595 So. 2d 32, 34 (Fla. 1992); *see also Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995).

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

under supervision by the custodian of the public record.⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

Only the Legislature may create an exemption to public records requirements.⁹ An exemption must be created by general law and must specifically state the public necessity which justifies the exemption.¹⁰ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill that enacts an exemption may not contain other substantive provisions¹¹ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.¹²

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” 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 confidential*.¹³ Records designated as “confidential and exempt” are not subject to inspection by the public and may only be released under the circumstances defined by statute.¹⁴ Records designated as “exempt” may be released at the discretion of the records custodian under certain circumstances.¹⁵

Open Government Sunset Review Act

The provisions of s. 119.15, F.S., known as the Open Government Sunset Review Act (the Act), prescribe a legislative review process for newly created or substantially amended public records or open meetings exemptions,¹⁶ with specified exceptions.¹⁷ The Act requires the repeal of such exemption 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 or repeal the sunset date.¹⁸ In practice, many exemptions are continued by repealing the sunset date, rather than reenacting the exemption.

The Act 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.¹⁹ An exemption serves an identifiable purpose if the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption *and* it meets one of the following purposes:

⁷ Section 119.07(1)(a), F.S.

⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violations of those laws.

⁹ FLA CONST., art. I, s. 24(c).

¹⁰ *Id.*

¹¹ The bill may, however, contain multiple exemptions that relate to one subject.

¹² FLA. CONST., art. I, s. 24(c)

¹³ *WFTV, Inc. v. The Sch. Bd. of Seminole County*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

¹⁴ *Id.*

¹⁵ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁶ 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 records or information or to include meetings.

¹⁷ Section 119.15(2)(a) and (b), F.S., provides that exemptions required by federal law or applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

¹⁸ Section 119.15(3), F.S.

¹⁹ Section 119.15(6)(b), F.S.

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;²⁰
- The release of sensitive personal information would be defamatory or jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;²¹ or
- It protects trade or business secrets.²²

The Act also requires specified questions to be considered during the review process.²³ In examining an exemption, the Act directs the Legislature to question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption or repealing the sunset date, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²⁴ If the exemption is reenacted or saved from repeal 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 expire, the previously exempt records will remain exempt unless otherwise provided by law.²⁵

Guardianship

A guardian is someone who is appointed by the court to act on behalf of a ward (an individual who has been adjudicated incapacitated) regarding his or her person or property or both.²⁶ The process to determine an individual's incapacity and the subsequent appointment of a guardian begins with a verified petition detailing the factual information supporting the reasons the petitioner believes the individual to be incapacitated, including the rights the alleged incapacitated person is incapable of exercising.²⁷ Once a person has been adjudicated incapacitated (termed a "ward"), the court appoints a guardian, and the letters of guardianship are issued.²⁸ The order appointing a guardian must be consistent with the ward's welfare and safety, must be the least restrictive appropriate alternative, and must reserve to the ward the right to make decisions in all matters commensurate with his or her ability to do so.²⁹

²⁰ Section 119.15(6)(b)1., F.S.

²¹ Section 119.15(6)(b)2., F.S.

²² Section 119.15(6)(b)3., F.S.

²³ Section 119.15(6)(a), F.S. The specific questions are:

- 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?

²⁴ FLA. CONST. art. I, s. 24(c).

²⁵ Section 119.15(7), F.S.

²⁶ Section 744.102(9), F.S.

²⁷ Section 744.3201(2), F.S.

²⁸ Sections 744.3371-744.345, F.S.

²⁹ Section 744.2005, F.S.

Office of Public and Professional Guardians

In 1999, the Legislature created the “Public Guardianship Act” and established the Statewide Public Guardianship Office (SPGO) within the Department Of Elder Affairs (DOEA).³⁰ In 2016, the Legislature renamed the Statewide Public Guardianship Office within the DOEA as the Office of Public and Professional Guardians (OPPG), required OPPG to regulate professional guardians and investigate complaints. Additionally, the OPPG was provided an additional six full-time equivalent positions, including an attorney and investigators.³¹ The OPPG appoints local public guardian offices to provide guardianship services to people who have neither adequate income nor assets to afford a private guardian, nor any willing family or friend to serve.³²

There are 17 public guardian offices that serve all 67 counties.³³ Since 2016, approximately 550 professional guardians have registered with the OPPG.³⁴

Confidentiality of Information Regarding Public Guardians

In 2018, the Legislature enacted s. 744.21031, F.S.,³⁵ to exempt from public records copying and inspection requirements the following information as it pertains to current or former public guardians and employees with fiduciary responsibility³⁶:

- Home addresses;
- Telephone numbers;³⁷
- Dates of birth;
- Places of employment; and
- Photographs.³⁸

The statute also exempts the same information for spouses and children of such persons, as well as the names of the spouses and children of a public guardian or employee with fiduciary responsibility, and the names and locations of schools and day care facilities attended by the children of a public guardian or employee with fiduciary responsibility.³⁹

³⁰ Chapter 99-277, L.O.F.

³¹ Chapter 2016-40, L.O.F.

³² The DOEA, *Office of Public and Professional Guardians*, available at <https://elderaffairs.org/programs-services/office-of-public-professional-guardians-oppg/> (last visited February 7, 2023).

³³ *Id.*

³⁴ *Id.*

³⁵ Chapter 2018-16, s. 1, L.O.F.

³⁶ Section 744.21031, F.S., defines “employees with fiduciary responsibility” to mean “an employee of a public guardian who has the ability to direct any transactions of a ward’s funds, assets, or property; who under the supervision of the guardian, manages the care of the ward; or who makes any health care decision, as defined in s. 765.101, on behalf of the ward.”

³⁷ Section 119.071(4)(d)1.b., defines “telephone numbers” includes home telephone numbers, personal cellular telephone numbers, personal pager telephone numbers, and telephone numbers associated with personal communications devices.

³⁸ Section 744.21031, F.S.

³⁹ *Id.*

The exemption applies to information held by an agency⁴⁰ before, on, or after July 1, 2018.⁴¹ An agency that is the custodian of such information is required to maintain the exempt status of that information only if the current or former public guardians and employees with fiduciary responsibility submit to the custodial agency a written request for maintenance of the exemption.⁴²

Open Government Sunset Review Findings

According to the public necessity statement included in the original public records exemption, it is a public necessity to protect identifying and location information of current and former public guardians and employees with fiduciary responsibility and their family members because the release of such information might place such individuals in danger of physical and emotional harm from disgruntled individuals who react inappropriately to actions taken by the public guardians and employees with fiduciary responsibility.⁴³

Additionally, the public necessity statement provided that despite the value of the services provided by public guardians, some wards and their family members have harassed their public guardians with threats of incarceration, violence, and death through voicemail messages and social media.⁴⁴ The public necessity statement also provides that after a public guardian or an employee with fiduciary responsibility concludes his or her service, the risk continues because a disgruntled individual may wait until then to commit an act of revenge.⁴⁵ The harm that may result from the release of a public guardian's or an employee with fiduciary responsibility's personal identifying and location information outweighs any public benefit that may be derived from the disclosure of the information.⁴⁶

On August 4, 2022, the Senate Committee on Children, Families, and Elder Affairs staff and the House of Representatives Government Operations Subcommittee staff jointly met with the executive director of the OPPG regarding the need to maintain the public records exemption.⁴⁷ The executive director stated that the exemption has only been utilized by one of the Offices of the Public Guardian since its inception. The Executive Director and DOEA staff expressed the need to maintain the exemption and also expressed support for narrowing the exemption.⁴⁸

⁴⁰ Section 119.011(2), F.S., defines "agency" to mean 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.

⁴¹ Section 744.21031, F.S.

⁴² *Id.*

⁴³ Chapter 2018-16, s. 2, L.O.F.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Meeting with staff of the DOEA (August 4, 2022).

⁴⁸ *Id.*

III. Effect of Proposed Changes:

The bill clarifies the application of the exemption by including definitions for terms that are commonly used in other public records laws, including defining “agency”⁴⁹ to have the same meaning as provided in s. 119.011, F.S., and “telephone numbers”⁵⁰ to have the same meaning as provided in s. 119.071(4)(d)1.b., F.S. The bill maintains the current definition of “employee with fiduciary responsibility” provided in s. 744.21031, F.S.

The bill saves from repeal the public records exemption in s. 744.21031, F.S., by maintaining certain provisions of the exemption as in current law and also narrows the exemption by allowing certain information that is currently exempt to become available for public disclosure. Specifically, the bill maintains the exemptions as in current law for the following identifying and location information held by an agency:

- The home addresses, telephone numbers, and dates of birth of current and former public guardians and employees with fiduciary duty.
- Photographs of former public guardians and employees with fiduciary responsibility.
- The names, home addresses, telephone numbers, and dates of birth of spouses and children of current and former public guardians and employees with fiduciary responsibility who are not themselves current or former public guardians or employees with fiduciary responsibility.
- The names and locations of schools and day care facilities attended by the children of such persons.

The bill removes the exempt status of the following information, thereby making this information available to the public:

- Places of employment of current or former public guardians, current or former employees with fiduciary duty, and the spouses and children of such persons. This was removed as a result of the report from the DOEA that their records do not include such information.
- The home addresses, telephone numbers, and dates of birth of spouses and children of current or former public guardians and employees with fiduciary responsibility who are or who have been a current or former public guardian or employee with fiduciary responsibility.
- Photographs of current public guardians and employees with fiduciary responsibility.

The current public records exemption stands repealed on October 2, 2023, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act. The bill removes the scheduled repeal date of October 2, 2023, to allow the exemption to continue the exempt status of the information.

The bill is effective October 1, 2023.

⁴⁹ Section 119.011, F.S. defines “agency” to mean “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.”

⁵⁰ Section 119.071(4)(d)1.b. defines “telephone numbers” to mean “home telephone numbers, personal cellular telephone numbers, personal pager telephone numbers, and telephone numbers associated with personal communications devices.”

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

Not applicable. The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

B. Public Records/Open Meetings Issues:**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 bill creating or expanding an exemption to the public records requirements. If an 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. This bill narrows a current public records exemption; thus, the bill does not require an extraordinary vote for enactment.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. This bill narrows a current public records exemption.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The purpose of the law is to protect identifying and location information of current and former public guardians, employees with fiduciary responsibility, and the family members of those individuals. This bill exempts only certain identifying and location information. The bill provides that releasing such information could jeopardize the safety of such individuals. The exemption does not appear to be broader than necessary to accomplish the purpose of the law.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The private sector will continue to be subject to the cost associated with an agency's review and redactions of exempt records in response to a public records request.

C. Government Sector Impact:

The government sector will continue to incur workload related to the review and redaction of exempt records associated with responding to public records requests.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 744.21031 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.