

**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: SPB 7010

INTRODUCER: Children, Families, and Elder Affairs Committee

SUBJECT: OGSR/Public and Professional Guardians

DATE: November 29, 2021

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

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Delia _____	Cox _____	_____	<b>Submitted as Committee Bill/Fav</b>

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## I. Summary:

SPB 7010 saves from repeal the public records exemption for certain information held by the Department of Elder Affairs (the DOEA) in connection with a complaint filed against, or an investigation of, a professional guardian. Specifically, the exemption covers the following investigative information:

- 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The public records exemption stands repealed on October 2, 2022, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act.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 the confidential and exempt status of the information.

The bill is effective October 1, 2022.

## II. Present Situation:

### 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>1</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>2</sup>

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

<sup>2</sup> *Id.*

Chapter 119, F.S., known as the Public Records Act, constitutes the main body of public records laws.<sup>3</sup> 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.<sup>4</sup>

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

The Public Records Act does not apply to legislative or judicial records.<sup>5</sup> 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:

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 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.”<sup>6</sup>

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

Only the Legislature may create an exemption to public records requirements.<sup>9</sup> An exemption must be created by general law and must specifically state the public necessity justifying the exemption.<sup>10</sup> Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions<sup>11</sup>

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<sup>3</sup> Public records laws are found throughout the Florida Statutes.

<sup>4</sup> Section 119.01(1), F.S.

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

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

<sup>7</sup> Section 119.07(1)(a), F.S.

<sup>8</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

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

<sup>10</sup> *Id.*

<sup>11</sup> The bill may, however, contain multiple exemptions that relate to one subject.

and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.<sup>12</sup>

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*.<sup>13</sup> 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.<sup>14</sup> Records designated as “exempt” may be released at the discretion of the records custodian under certain circumstances.<sup>15</sup>

### **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,<sup>16</sup> with specified exceptions.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</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>20</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>21</sup> or
- It protects trade or business secrets.<sup>22</sup>

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

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

<sup>14</sup> *Id.*

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

<sup>16</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 records or information or to include meetings.

<sup>17</sup> 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.

<sup>18</sup> Section 119.15(3), F.S.

<sup>19</sup> Section 119.15(6)(b), F.S.

<sup>20</sup> Section 119.15(6)(b)1., F.S.

<sup>21</sup> Section 119.15(6)(b)2., F.S.

<sup>22</sup> Section 119.15(6)(b)3., F.S.

The Act also requires specified questions to be considered during the review process.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

## **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.<sup>26</sup> 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.<sup>27</sup> Once a person has been adjudicated incapacitated (termed a "ward"), the court appoints a guardian, and the letters of guardianship are issued.<sup>28</sup> 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.<sup>29</sup>

## **Appointment of Professional Guardians**

A professional guardian is a guardian who has at any time rendered services to three or more wards as their guardian; however, a person serving as a guardian for two or more relatives is not considered a professional guardian. A public guardian is considered a professional guardian for purposes of regulation, education, and registration.<sup>30</sup>

In each case when a court appoints a professional guardian and does not use a rotation system for such appointment, the court must make specific findings of fact stating why the person was

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<sup>23</sup> Section 119.15(6)(a), F.S. The specified 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?

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

<sup>25</sup> Section 119.15(7), F.S.

<sup>26</sup> Section 744.102(9), F.S.

<sup>27</sup> Section 744.3201(2), F.S.

<sup>28</sup> Sections 744.3371-744.345, F.S.

<sup>29</sup> Section 744.2005, F.S.

<sup>30</sup> Section 744.102(17), F.S.

selected as guardian in the particular matter involved.<sup>31</sup> The findings must reference the following factors that must be considered by the court:

- Whether the guardian is related by blood or marriage to the ward;
- Whether the guardian has educational, professional, or business experience relevant to the nature of the services sought to be provided;
- Whether the guardian has the capacity to manage the financial resources involved;
- Whether the guardian has the ability to meet the requirements of the law and the unique needs of the individual case;
- The wishes expressed by an incapacitated person as to who shall be appointed guardian;
- The preference of a minor who is age 14 or over as to who should be appointed guardian;
- Any person designated as guardian in any will in which the ward is a beneficiary; and
- The wishes of the ward's next of kin, when the ward cannot express a preference.<sup>32</sup>

Additionally, the court may not give preference to the appointment of a person based solely on the fact that such person was appointed by the court to serve as an emergency temporary guardian.<sup>33</sup> When a professional guardian is appointed as an emergency temporary guardian, that professional guardian may not be appointed as the permanent guardian of a ward unless one of the next of kin of the alleged incapacitated person or the ward requests that the professional guardian be appointed as permanent guardian. However, the court may waive this limitation if the special requirements of the guardianship demand that the court appoint a guardian because he or she has special talent or specific prior experience.<sup>34</sup>

### ***Regulation of Public and Professional Guardians***

The Legislature created the Statewide Public Guardianship Office in 1999 to provide oversight for all public guardians.<sup>35</sup> In 2016, the Legislature renamed the Statewide Public Guardianship Office within the Department of Elder Affairs (the DOEA) as the Office of Public and Professional Guardians (the OPPG) and expanded the OPPG's responsibilities.<sup>36</sup> The OPPG now regulates professional guardians with certain disciplinary and enforcement powers.<sup>37</sup> Specifically, s. 744.2004, F.S., requires the OPPG to review and, if determined legally sufficient, investigate any complaint that a professional guardian has violated the standards of practice established by the OPPG.

According to the DOEA, the annual numbers of complaints filed against a guardian or involving a guardianship since 2016 are as follows:

- 183 in 2016;
- 132 in 2017;
- 56 in 2018;
- 113 in 2019;
- 169 in 2020; and

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<sup>31</sup> Section 744.312(4)(a), F.S.

<sup>32</sup> Section 744.312(2)-(3), F.S.

<sup>33</sup> Section 744.312(5), F.S.

<sup>34</sup> Section 744.312(4)(b), F.S.

<sup>35</sup> Chapter 99-277, L.O.F.

<sup>36</sup> See CS/CS/CS/SB 232 (2016) and ch. 2016-40, L.O.F.

<sup>37</sup> Section 744.2004, F.S.

- 89 in the first 6-months of 2021.<sup>38</sup>

The annual number of public records requests regarding OPPG complaints since 2017 are as follows:

- 17 in 2017;
- 11 in 2018;
- 63 in 2019;
- 31 in 2020; and
- 48 in the first 8-months of 2021.<sup>39</sup>

### **Confidentiality of Information Held by the Office of Public and Professional Guardians**

In 2017, the Legislature created s. 744.2111, F.S., containing a public records exemption for the following information in a complaint and subsequent investigation held by the OPPG:

- 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.<sup>40</sup>

Such information is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. 1 of the Florida Constitution until the investigation pertaining to the information is completed or inactive, unless a court requires disclosure.<sup>41</sup> The information may still be provided to a law enforcement agency, any other regulatory agency in the performance of its official duties and responsibilities, or, pursuant to s. 744.368, F.S., the clerk of the court.<sup>42</sup> The exemption applies to all documents received relating to a complaint before, on, or after July 1, 2017.<sup>43</sup>

### **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 the identity of a complainant because revealing such information may damage their good name and the complainant could be put at risk of retaliation.<sup>44</sup> Additionally, the public necessity statement provided 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 the DOEA's ability to regulate guardians.<sup>45</sup>

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<sup>38</sup> Email from Derek Miller, Legislative Affairs Director, the DOEA, August 26, 2021. On file with the Senate Children, Families, and Elder Affairs Committee.

<sup>39</sup> *Id.*

<sup>40</sup> Chapter 2017-176, s. 1, L.O.F.

<sup>41</sup> Section 744.2111(2), F.S.

<sup>42</sup> Section 744.2111(3), F.S. Section 744.368, F.S., lists responsibilities of the clerk of the court in guardianship matters, which include reviewing annual guardianship reports, auditing inventories and accountings completed by a guardian of the property, and reviewing record and documents that reasonably impact guardianship assets.

<sup>43</sup> Section 744.2111(4), F.S.

<sup>44</sup> Chapter 2017-176, s. 2, L.O.F.

<sup>45</sup> *Id.*

On August 17, 2021, the Senate Children, Families, and Elder Affairs Committee staff and the House Government Operations Subcommittee staff jointly met with the executive director of the OPPG regarding the need to maintain the public records exemption.<sup>46</sup> The executive director stated that the exemption is effective and important, particularly given the high number of public records requests received by the OPPG.<sup>47</sup> The executive director recommended retaining the exemption in its current form.<sup>48</sup>

### III. Effect of Proposed Changes:

The bill saves from repeal the public records exemption in s. 744.2111, F.S., for certain information held by the DOEA in connection with a complaint filed against, or an investigation of, a professional guardian.

Specifically, the exemption covers the following investigative information:

- 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 public records exemption stands repealed on October 2, 2022, 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 the confidential and exempt status of the information.

This bill is effective October 1, 2022.

### 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 continues a current public records exemption beyond

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<sup>46</sup> Meeting with staff of the DOEA (August 17, 2021).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

its current date of repeal; 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 continues a current public records exemption without expansion.

### **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 confidential information in connection with a complaint filed against, or an investigation of, a professional guardian. This bill exempts only certain identifying information, health and financial information, and photographs and recordings of complainants and wards in connection with a complaint filed with the DOEA from the public records requirements. The bill provides that releasing such information could cause unwarranted damage to the reputation of the individual and jeopardize the safety of such individuals. In addition, releasing such information may jeopardize investigations of the agency. 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:

None.

C. Government Sector Impact:

None.



**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 744.2111 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.