

**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 Governmental Oversight and Accountability Committee

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BILL: PCS/SB 888 (543450)

INTRODUCER: Governmental Oversight and Accountability Committee

SUBJECT: OGSR/Information Held by Guardians ad Litem

DATE: March 19, 2010

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Walsh	Walsh	CF	<b>Favorable</b>
2.	Anderson/Maclure	Maclure	JU	<b>Favorable</b>
3.	Naf	Wilson	GO	<b>Pre-meeting</b>
4.			RC	
5.				
6.				

**Please see Section VIII. for Additional Information:**

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

This bill is the result of an Open Government Sunset Review performed by the Committee on Children, Families, and Elder Affairs.

Current law<sup>1</sup> provides that any information related to the best interests of a child, as determined by a guardian ad litem and which is held by a guardian ad litem, is confidential and exempt from public-records requirements. This exemption is subject to review under the Open Government Sunset Review Act<sup>2</sup> and will sunset on October 2, 2010, unless saved from repeal through reenactment by the Legislature. This bill reenacts and amends the exemption to specify the types of information that are protected and to remove the ability of a guardian ad litem to protect any other information if the guardian ad litem determines that such protection is in the best interest of the child. The bill also reorganizes the exemption.

This bill does not expand the scope of the public-records exemption and therefore does not require a two-thirds vote of each house of the Legislature for passage.

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<sup>1</sup> Section 39.0132, F.S.

<sup>2</sup> Section 119.15, F.S.

This bill substantially amends section 39.0132, Florida Statutes.

## II. Present Situation:

### Florida's Public-Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Section 24(a), art. I, of the State Constitution, provides that:

Every person has the right to inspect or copy any public records made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public Records Law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record<sup>3</sup> must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency<sup>4</sup> records are to be available for public inspection.

Section 119.011(12), F.S., defines the term "public record" 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 connection 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

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<sup>3</sup> Section 119.011(12), F.S., defines "public records" to include "all documents, papers, letters, maps, books, tapes, photographs, film, 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."

<sup>4</sup> Section 119.011(2), F.S., defines "agency" as "...any state, county, district, authority, or municipal officer, department, division, 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."

“intended to perpetuate, communicate, or formalize knowledge.”<sup>5</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>6</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>7</sup> Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.<sup>8</sup> A bill enacting an exemption<sup>9</sup> may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.<sup>10</sup>

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.<sup>11</sup> If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>12</sup>

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

The Open Government Sunset Review Act<sup>13</sup> provides for the systematic review of an exemption from the Public Records Act in the fifth year after its enactment. The act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.<sup>14</sup> An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.<sup>15</sup> An exemption meets the statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which ... would be defamatory ... or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals; or
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is

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<sup>5</sup> *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640(Fla. 1980).

<sup>6</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>7</sup> Article I, s. 24(c) of the State Constitution.

<sup>8</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

<sup>9</sup> Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>10</sup> Section 24(c), art. I of the State Constitution

<sup>11</sup> Attorney General Opinion 85-62, August 1, 1985.

<sup>12</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d. 289 (Fla. 1991).

<sup>13</sup> Section 119.15, F.S.

<sup>14</sup> Section 119.15(6)(b), F.S.

<sup>15</sup> *Id.*

used to protect or further a business advantage over those who do not know or use it, the disclosure of which ... would injure the affected entity in the marketplace.<sup>16</sup>

The act also requires the Legislature to consider six questions that go to the scope, public purpose, and necessity of the exemption.<sup>17</sup>

### **Guardian Ad Litem Program**

The Florida Guardian ad Litem Program is a partnership of community advocates and professional staff acting on behalf of Florida's abused and neglected children.<sup>18</sup> A guardian ad litem (GAL) is "a volunteer appointed by the court to protect the rights and advocate the best interests of a child involved in a court proceeding."<sup>19</sup> As of July 8, 2009, there were approximately 27,000 children represented by close to 7,000 volunteers in the Guardian ad Litem Program.<sup>20</sup>

According to the Statewide Guardian ad Litem Program, a GAL's responsibilities include but are not limited to the following:

- Visiting the child and keeping the child informed about the court proceedings;
- Gathering and assessing independent information on a consistent basis about the child in order to recommend a resolution that is in the child's best interest;
- Reviewing records;
- Interviewing appropriate parties involved in the case, including the child;
- Determining whether a permanent plan has been created for the child in accordance with federal and state law and whether appropriate services are being provided to the child and family;
- Submitting a signed written report with recommendations to the court on what placement, visitation plan, services, and permanent plan are in the best interest of the child;
- Attending and participating in court hearings and other related meetings to advocate for a permanent plan, which serves the child's best interest; and
- Maintaining complete records about the case, including appointments scheduled, interviews held, and information gathered about the child and the child's life circumstances.<sup>21</sup>

The Guardian ad Litem Program receives information of a sensitive nature from third-party sources, such as medical providers, mental health providers, schools, and law enforcement. These records are maintained by a GAL and relate exclusively to children who allegedly have been abused, neglected, or abandoned and are in the dependency court system through no fault of

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<sup>16</sup> *Id.*

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

<sup>18</sup> Florida Guardian ad Litem Program, website homepage, <http://www.guardianadlitem.org/> (last visited December 4, 2009).

<sup>19</sup> Florida Guardian ad Litem Program, *Volunteer: Frequently Asked Questions*, [http://www.guardianadlitem.org/vol\\_faq.asp](http://www.guardianadlitem.org/vol_faq.asp) (last visited December 4, 2009).

<sup>20</sup> Press Release, Florida Statewide Guardian ad Litem Office, Statewide Guardian ad Litem Program Executive Director Marks First Six Months (July 8, 2009), available at <http://www.guardianadlitem.org/documents/PressRelease07.08.09.pdf> (last visited December 4, 2009).

<sup>21</sup> Florida Guardian ad Litem Program, *supra* note 13.

their own. According to the Guardian ad Litem Program, these records contain sensitive information that could harm the child should they be released.

### **Public-Records Exemption Under Review**

In 2005, the Legislature created a public-records exemption for any information related to the best interests of a child as determined by a GAL that is held by a GAL.<sup>22</sup> Such confidential and exempt information includes but is not limited to medical, mental health, substance abuse, child care, education, law enforcement, court, social services, and financial records; and any other information maintained by a GAL that is confidential information under chapter 39, F.S.

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2010, unless reenacted by the Legislature.<sup>23</sup>

### **Open Government Sunset Review by Committee on Children, Families, and Elder Affairs**

Based upon the Open Government Sunset Review of the exemption, professional staff of the Senate Committee on Children, Families, and Elder Affairs recommended in September 2009 that the Legislature retain the public-records exemption established in s. 39.0132(4)(a)2., F.S.<sup>24</sup> This recommendation was made in light of the information gathered for the Open Government Sunset Review which indicated that there is a public necessity to continue to protect information of a sensitive personal nature concerning children served by the Guardian ad Litem Program. This review also concluded that, if released, this information could cause unwarranted damage to the good name or reputation of the children or their families.

### **III. Effect of Proposed Changes:**

The bill removes the repeal date, thereby reenacting the public-records exemption. It amends the exemption to specify the information made confidential and exempt from public-records requirements. The bill makes it explicit that medical, mental health, substance abuse, child care, education, law enforcement, court, social services, and financial records, in addition to any other information that is confidential under chapter 39, F.S., is confidential and exempt when held by a GAL.

The bill removes the ability of the GAL to protect any other information if the GAL determines that such protection is in the best interest of the child.

The bill reorganizes the exemption.

The effective date of the bill is October 1, 2010.

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<sup>22</sup> Section 2 of ch. 2005-213, L.O.F., codified at s. 39.0132(4)(a)2., F.S.

<sup>23</sup> Section 39.0132(4)(a)2., F.S.

<sup>24</sup> Committee on Children, Families, and Elder Affairs, Fla. Senate, *Open Government Sunset Review of Section 39.0132(4)(a)2., F.S., Guardians ad Litem* (Interim Report 2010-207) (Sept. 2009), available at [http://www.flsenate.gov/data/Publications/2010/Senate/reports/interim\\_reports/pdf/2010-207cf.pdf](http://www.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-207cf.pdf) (last visited Feb. 9, 2010).

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

None.

**B. Public Records/Open Meetings Issues:**

The bill reenacts and amends an existing public-records exemption specified in s. 39.0132(4)(a)2. The bill does not expand the scope of the exemption and therefore does not require a two-thirds vote of each house of the Legislature for passage.

The bill removes the ability of the GAL to protect any other information if the GAL determines that such protection is in the best interest of the child. Article I, s. 24(c) of the State Constitution provides that *only* the Legislature can create an exemption from public-records or public-meetings requirements. Thus, authorizing the GAL to determine whether additional information should be made confidential and exempt violates this directive and appears to be an unlawful delegation of legislative authority.

**C. Trust Funds Restrictions:**

None.

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

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

- A. **Proposed Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Proposed Committee Substitute and the prior version of the bill.)

**PCS by Governmental Oversight and Accountability on March 23, 2010:**

The proposed committee substitute:

- Specifies the types of information made confidential and exempt from public-records requirements;
- Removes the ability of a GAL to protect any other information if the GAL determines that such protection is in the best interest of the child; and,
- Reorganizes the exemption.

- B. **Amendments:**

None.

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

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