

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1037 Pub. Rec./Public Guardians/Employees with Fiduciary Responsibility  
**SPONSOR(S):** Children, Families & Seniors Subcommittee; Gruters and others  
**TIED BILLS:** IDEN./SIM. **BILLS:** CS/CS/SB 268

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	11 Y, 0 N, As CS	Langston	Brazzell
2) Oversight, Transparency & Administration Subcommittee	12 Y, 0 N	Toliver	Harrington
3) Health & Human Services Committee			

### SUMMARY ANALYSIS

Guardianship is a concept whereby a “guardian” acts on behalf of a “ward,” whom the law regards as incapable of managing his or her own affairs due to age or incapacity. For adults, a guardianship may be established when a person has demonstrated that he or she is unable to manage his or her own affairs. Individuals who need guardianship may have dementia, Alzheimer’s disease, a developmental disability, chronic illness, or other conditions that cause functional limitations.

The Legislature created the Statewide Public Guardianship Office in 1999 to provide oversight for all public guardians; it was renamed the Office of the Public and Professional Guardians in 2016. A public guardian may serve “an incapacitated person if there is no family member or friend, other person, bank, or corporation willing and qualified to serve as guardian.” A public guardian is considered a professional guardian for purposes of regulation, education, and registration.

The bill creates a public records exemption for the identifying and location information of current and former public guardians, employees with fiduciary responsibility, and their spouses and children. Additionally, the bill exempts the places of employment of spouses and children of these personnel and the names and locations of schools and day care facilities attended by the children of those persons.

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

The bill does not have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2018.

**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 a public record exemption; thus, it requires a two-thirds vote for final passage.**

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### Guardianship

Guardianship is a concept whereby a “guardian”<sup>1</sup> acts on behalf of a “ward,” whom the law regards as incapable of managing his or her own affairs due to age or incapacity.<sup>2</sup> There are two main forms of guardianship: guardianship over the person or guardianship over the property, which may be limited or plenary.<sup>3</sup> A person serving as a public guardian is considered a professional guardian for purposes of regulation, education, and registration.<sup>4</sup>

For adults, a guardianship may be established when a person has demonstrated that he or she is unable to manage his or her own affairs. If the adult is competent, this can be accomplished voluntarily. However, when an individual’s mental competence is in question, an involuntary guardianship may be established through the adjudication of incompetence which is determined by a court appointed examination committee.<sup>5</sup> Individuals who need guardianship may have dementia, Alzheimer’s disease, a developmental disability, chronic illness, or other conditions that cause functional limitations.<sup>6</sup>

##### *Fiduciary Relationship*

A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of that relationship.<sup>7</sup> The relationship between a guardian and his or her ward is a fiduciary one.<sup>8</sup> The guardian, as fiduciary, must:

- Act within the scope of the authority granted by the court and as provided by law;
- Act in good faith;
- Not act in a manner contrary to the ward's best interests under the circumstances; and
- Use any special skills or expertise the guardian possesses when acting on behalf of the ward.<sup>9</sup>

Additionally, s. 744.446, F.S., states that there is a fiduciary relationship between the guardian and the ward and that such relationship may not be used for the private gain of the guardian other than the remuneration for fees and expenses provided by law. Section 744.361, F.S., imposes specific duties upon a guardian consistent with the basic duties of a fiduciary. As such, the guardian must act in the best interest of the ward and carry out his or her responsibilities in an informed and considered manner.

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<sup>1</sup> Section 744.102(9), F.S.

<sup>2</sup> Section 744.102(22), F.S.

<sup>3</sup> Section 744.2005(2), F.S.

<sup>4</sup> Section 744.102(17), F.S.

<sup>5</sup> Section 744.102(12), F.S.

<sup>6</sup> *Lighting the Way to Guardianship and Other Decision-Making Alternatives: A Manual for Individuals and Families*, Florida Developmental Disabilities Council, Inc, (2010), available at [https://www.fddc.org/sites/default/files/file/publications/Guardianship%20Family%20Manual\\_0.pdf](https://www.fddc.org/sites/default/files/file/publications/Guardianship%20Family%20Manual_0.pdf) (last visited January 20, 2018).

<sup>7</sup> *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002).

<sup>8</sup> Section 744.361(1), F.S. Additionally, Florida courts have long recognized the relationship between a guardian and his or her ward as a classic fiduciary relationship. *Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st DCA 1990).

<sup>9</sup> Section 744.361(2)-(5), F.S.

## Office of the Public and Professional Guardians

The Legislature created the Statewide Public Guardianship Office in 1999 to provide oversight for all public guardians.<sup>10</sup> In 2016, the Legislature renamed the Statewide Public Guardianship Office within the Department of Elder Affairs to the Office of Public and Professional Guardians (OPPG) and expanded the OPPG's responsibilities.<sup>11</sup>

A public guardian may serve "an incapacitated person if there is no family member or friend, other person, bank, or corporation willing and qualified to serve as guardian."<sup>12</sup> A public guardian may be an appointee of the OPPG or a contract employee of a nonprofit corporation.<sup>13</sup> There are 17 public guardianship programs, with offices located in all 20 judicial circuits in the state.<sup>14</sup>

A public guardian is considered a professional guardian for purposes of regulation, education, and registration.<sup>15</sup> Rule 58M-2.001(1)(c), F.A.C., defines "employee with fiduciary responsibility" as an employee of a professional guardian who has the ability to direct any withdrawal or investments from a ward's banking or investment accounts, supervises the care of the ward under the supervision of the guardian, or who makes any health care decision on behalf of the ward, as well as an employee of a professional guardian who has in-person contact with the Ward more than five times in any 30-day period.

Public guardians annually serve an approximate 3,500 wards statewide, frequently serving as the legally appointed representative for vulnerable persons with disabilities.<sup>16</sup> Public guardians may serve wards who are a behavioral risk to the public guardian.<sup>17</sup> Additionally, the court may have appointed the public guardian because family, friends, or support staff in the ward's life had abused, neglected, or exploited the ward.<sup>18</sup> In some instances wards themselves, disgruntled friends and family of the ward, or persons who previously exploited the ward will threaten the public guardian.<sup>19</sup> OPPG has had numerous reports from public guardians that guardians and their staff have been personally threatened and at times were fearful of their safety.<sup>20</sup>

Currently, the names, home addresses, telephone numbers, dates of birth, and places of employment of public guardians, employees with fiduciary responsibility, and their spouses and children, as well as the names and locations of schools and day care facilities of their children are subject to release pursuant to a public records request.

### Public Records and Open Meetings Requirements

The Florida Constitution provides that the public has the right to access government records and meetings.<sup>21</sup> 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>22</sup> The public also has a right to notice of, and access to meetings of any collegial public body of

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<sup>10</sup> Chapter 99-277 L.O.F.

<sup>11</sup> Chapter 2016-40, L.O.F.

<sup>12</sup> Section 744.2007(1), F.S.

<sup>13</sup> Section 744.2006, F.S.

<sup>14</sup> DEPARTMENT OF ELDER AFFAIRS, *Florida Public Guardian Programs*, [http://elderaffairs.state.fl.us/doea/spgo\\_public.php](http://elderaffairs.state.fl.us/doea/spgo_public.php) (last visited January 20, 2018).

<sup>15</sup> Section 744.102(17), F.S.

<sup>16</sup> Department of Elder Affairs, Agency Analysis of 2018 House Bill 1037 (Jan. 9, 2018), p.6 (on file with Children, Families, and Seniors Subcommittee staff).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> FLA. CONST., art. I, s. 24.

<sup>22</sup> FLA. CONST., art. I, s. 24(a).

the executive branch of state government or of any local government.<sup>23</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>24</sup>

Florida law specifies the conditions under which public access must be provided to government records and meetings.<sup>25</sup> The Public Records Act<sup>26</sup> guarantees every person's right to inspect and copy any state or local government public record. The Sunshine Law<sup>27</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>28</sup>

The Legislature may create an exemption to public records or open meetings requirements.<sup>29</sup> An exemption must specifically state the public necessity justifying the exemption<sup>30</sup> and must be tailored to accomplish the stated purpose of the law.<sup>31</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 confidential and exempt.<sup>32</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 record or open meeting exemptions.<sup>33</sup> The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment.<sup>34</sup> The Legislature must reenact the exemption in order to save it from repeal.<sup>35</sup>

The OGSR provides that a public record or open meeting exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary<sup>36</sup> to meet one of the following purposes:

- Allow the state or its political subdivision to effectively and efficiently administer a program, the administration of which would be significantly impaired without the exemption; or
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only personal identifying information may be exempted under this provision; or
- Protect trade or business secrets.<sup>37</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>38</sup>

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<sup>23</sup> FLA. CONST., art. I, s. 24(b).

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

<sup>25</sup> Chapter 119, F.S.

<sup>26</sup> *Id.*

<sup>27</sup> Section 286.011, F.S.

<sup>28</sup> Section 286.011(1)-(2), F.S.

<sup>29</sup> FLA. CONST., art. I, s. 24(c).

<sup>30</sup> FLA. CONST., art. I, s. 24(c).

<sup>31</sup> FLA. CONST., art. I, s. 24(c).

<sup>32</sup> A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991) *review denied*, 589 So. 2d 289 (Fla. 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See *WFTV, Inc. v. Sch. Bd. of Seminole Cnty*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004); Op. Att'y Gen. Fla. 85-692 (1985).

<sup>33</sup> S. 119.15, F.S.

<sup>34</sup> Section 119.15(3), F.S.

<sup>35</sup> *Id.*

<sup>36</sup> Section 119.15(6)(b), F.S.

<sup>37</sup> *Id.*

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>39</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>40</sup>

### Effect of Proposed Changes

The bill exempts from public records requirements the home addresses, telephone numbers, dates of birth, places of employment, and photographs of:

- Current or former public guardians and employees with fiduciary responsibility, and
- Spouses and children of the above persons.

Additionally, the bill exempts the places of employment of spouses and children of these personnel and the names and locations of schools and day care facilities attended by the children of those persons.

The bill defines an “employee with fiduciary responsibility” as an employee of a public guardian who:

- Has the ability to direct any withdrawals or investments made from a ward’s banking or investment accounts;
- Under the supervision of the guardian, supervises the care of the ward; or
- Makes any health care decision, as defined in s. 765.101, F.S.,<sup>41</sup> on behalf of the ward.

The bill provides a public necessity statement as required by the Florida Constitution, specifying that public guardians may be at risk of harm by a disgruntled ward. The bill includes examples of how public guardians have been threatened and injured by their wards. The bill finds that the release of identifying and location information of current and former public guardians and employees with fiduciary responsibility, and their family members places them in danger of physical and emotional harm from disgruntled individuals who may act inappropriately or seek revenge due to actions taken by public guardians. It also states that the harm that may result from the release of such personal identifying and location information outweighs any public benefit that may be derived from the disclosure of the information.

The bill also provides that the public record exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2023, unless reviewed and saved from repeal through reenactment by the Legislature.

Lastly, the bill provides for retroactive application of the public record exemption.<sup>42</sup>

### B. SECTION DIRECTORY:

**Section 1:** Creates s. 744.21031, F.S., relating to public records exemption.

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<sup>38</sup> *Id.*

<sup>39</sup> FLA. CONST., art. I, s. 24(c).

<sup>40</sup> Section 119.15(7), F.S.

<sup>41</sup> Section 765.101, F.S., defines “health care decision” to mean one of following: Informed consent, refusal of consent, or withdrawal of consent to any and all health care, including life-prolonging procedures and mental health treatment, unless otherwise stated in the advance directives; the decision to apply for private, public, government, or veterans’ benefits to defray the cost of health care; the right of access to health information of the principal reasonably necessary for a health care surrogate or proxy to make decisions involving health care and to apply for benefits; or the decision to make an anatomical gift pursuant to part V of ch. 765, F.S. .

<sup>42</sup> The Supreme Court of Florida ruled that a public record exemption is not to be applied retroactively unless the legislation clearly expresses intent that such exemption is to be applied as such. Access to public records is a substantive right. Thus, a statute affecting that right is presumptively prospective and there must be a clear legislative intent for the statute to apply retroactively. *See Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 784 So. 2d 438, 441 (Fla. 2001).

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

**Section 3:** Provides an effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

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, section 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 exemption; therefore, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, section 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 a public record exemption; therefore, it requires a public necessity statement, which it includes.

Breadth of Exemption

Article I, section 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 seeks to prevent the disclosure of certain identifying information of public guardians and employees with fiduciary responsibility and their families to protect their safety. Thus, the bill does not appear to be in conflict with the constitutional requirement that an exemption be no broader than necessary to accomplish its purpose.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On January 17, 2018, the Children, Families, and Seniors Subcommittee adopted an amendment that defined the term “employee with fiduciary responsibility” as an employee of a public guardian who:

- Has the ability to direct any withdrawals or investments made from a ward’s banking or investment accounts;
- Under the supervision of the guardian, supervises the care of the ward; or
- Makes any health care decision, as defined in s. 765.101, F.S., on behalf of the ward.

The bill was reported favorably as a committee substitute. The analysis is drafted to the committee substitute as passed by the Children, Families, and Seniors Subcommittee.