HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: HB 7017 PCB GOS 22-07 OGSR/Public and Professional Guardians/Department of Elderly Affairs
SPONSOR(S): Government Operations Subcommittee; Rizo
TIED BILLS: **IDEN./SIM. BILLS:** SB 7010

FINAL HOUSE FLOOR ACTION: 113 **Y's** 1 **N's** **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

HB 7017 passed the House on March 2, 2022, as SB 7010 as amended. The Senate concurred in the House amendment to the Senate bill and subsequently passed the bill as amended on March 8, 2022.

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

Guardianship is a concept whereby a "guardian" acts for another, called 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. 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. Generally, three types of guardians are appointed to wards in Florida: professional guardians, public guardians, and family guardians. A person serving as a public guardian is considered a professional guardian for purposes of regulation, education, and registration.

The Office of Public and Professional Guardians (Office) within the Department of Elder Affairs (Department) has oversight over all public guardians. The Office must review and, if legally sufficient, investigate, any complaint that a professional guardian has violated the standards of practice established by the Office.

Current law provides a public record exemption for the personal identifying information of a person filing a formal administrative complaint, the personal identifying information of a ward, all personal health and financial records of a ward, and all photographs and video recordings, when such records or information are held by the Department in connection with a complaint until the investigation is completed or ceases to be active.

This bill saves from repeal the public record exemption, which will repeal on October 2, 2022, if this bill does not become law. The bill narrows the public record exemption by providing that only photographs and video recordings of a complainant or ward are confidential and exempt from public record requirements. The bill also describes when an investigation is considered "active" for purposes of the public record exemption.

This bill does not appear to have a fiscal impact on state or local governments.

The bill was approved by the Governor on April 6, 2022, ch. 2022-45, L.O.F., and will become effective on October 1, 2022.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Open Government Sunset Review Act

The Open Government Sunset Review Act (Act)[1] sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.[2]

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protect trade or business secrets.[3]

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.[4] If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created then a public necessity statement and a two-thirds vote for passage are not required.

Public and Professional Guardians

Guardianship is a concept whereby a "guardian" acts for another, called a "ward," whom the law regards as incapable of managing his or her own affairs due to age or incapacity.[5] There are two main forms of guardianship: guardianship over the person or guardianship over the property, which may be limited or plenary.[6] 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.[7]

Generally, three types of guardians are appointed to wards in Florida: professional guardians, public guardians, and family guardians. Professional guardians are appointed to provide services to three or more wards who are not family members of the guardian. Public guardians are considered to be professional guardians, but are generally appointed to serve indigent wards. Family guardians are appointed to serve their own family members and are not considered to be professional guardians,

[1] Section 119.15, F.S.
[2] Section 119.15(3), F.S.
[3] Section 119.15(6)(b), F.S.
[4] Section 24(c), Art. I, FLA. CONST.
[5] Section 744.102(9), F.S.
[6] Section 744.2005, F.S.
[7] Section 744.102(12), F.S.

regardless of how many family members they serve. A person serving as a public guardian is considered a professional guardian for purposes of regulation, education, and registration.[8]

Regulation of Public and Professional Guardians

The Legislature created the Statewide Public Guardianship Office in 1999 to provide oversight over all public guardians.[9] In 2016, the Legislature renamed the Statewide Public Guardianship Office within the Department of Elder Affairs (Department) as the Office of Public and Professional Guardians (Office) and expanded the Office's responsibilities.[10] The expansion of the Office's oversight of professional guardians followed reports of abuse and inappropriate behavior by professional guardians.[11] The Office now regulates professional guardians with certain disciplinary and enforcement powers.[12] Specifically, s. 744.2004, F.S., requires the Office to review and, if determined legally sufficient, investigate any complaint that a professional guardian has violated the standards of practice established by the Office.

Confidentiality of Records Held by the Office

Current law requires any medical, financial, or mental health records held by an agency, or the court and its agencies, or financial audits of guardianship records prepared by the clerk of the court to be provided to the Office upon its request, if such records or financial audits are necessary to:

- Investigate a guardian as a result of a complaint filed with the Office;
- Evaluate the public guardianship system;
- Assess the need for additional public guardianship; or
- Develop required reports.[13]

Any confidential or exempt information provided to the Office must continue to be held confidential or exempt as otherwise provided by law.[14] All records held by the Office relating to the medical, financial, or mental health of vulnerable adults,[15] persons with a developmental disability,[16] or persons with a

[8] Section 744.102(17), F.S.
[9] Chapter 99-277 L.O.F.
[10] *See* CS/CS/CS/SB 232 (2016) and Chapter 2016-40, L.O.F.
[11] *See, e.g.*, Florida Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, 2003, *available at* http://flcourts.org/core/fileparse.php/260/urlt/guardianshipmonitoring.pdf (last visited November 10, 2021) (reviewed how effectively guardians were fulfilling their duties and obligations. The committee received input from citizens that there was abuse, neglect, and misuse of wards' funds. As a result, the committee stated that, though the majority of guardians are law-abiding and are diligently fulfilling their complex responsibilities, a small percentage are not properly handling guardianship matters, and as a result, monitoring is necessary)
[12] Section 744.2004, F.S.
[13] Section 744.2111, F.S.
[14] *Id*.
[15] "Vulnerable adult" is defined as a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging. Section 415.102(28), F.S.
[16] "Developmental disability" is defined as a disorder or syndrome that is attributable to intellectual disability, cerebral palsy, autism, spina bifida, Down syndrome, Phelan-McDermid syndrome, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely. Section 393.063(12), F.S.

mental illness,[17] are confidential and exempt[18] from s. 119.07(1), F.S., and Article I, s. 24(a) of the State Constitution.[19]

Public Record and Public Meeting Exemptions under Review

In 2017, the Legislature created an exemption from public records requirements for the personal identifying information of a person filing a formal administrative complaint, the personal identifying information of a ward, all personal health and financial records of a ward, and all photographs and video recordings, when such records and information are held by the Department in connection with a complaint filed under part II of chapter 744, F.S. Such information is confidential and exempt from public records requirements.[20]

The 2017 public necessity statement[21] for the exemption provides that the Legislature finds that the public record exemption is necessary because:

> Release of identifying information about a complainant and ward could cause unwarranted damage to the reputation of such individual, especially if the information associated with the individual is inaccurate. Furthermore, if complainant and ward are identifiable, public access to such information could jeopardize the safety of such individuals by placing them at risk for retaliation by the professional guardian against whom a complaint has been made. Additionally, the investigation of a complaint conducted by the Department of Elder Affairs may lead to the filing of an administrative, civil, or criminal proceeding or may affect the department's decision regarding a registration… The release of identifying information could jeopardize the integrity of the investigation and impair the ability of a law enforcement agency, regulatory agency in the performance, of its official duties and responsibilities, or the clerk of the circuit court, to carry out their statutory duties.[22]

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2022, unless reenacted by the Legislature.[23]

During the 2021 interim, House Government Operations Subcommittee staff conducted an interview with staff from the Department as part of its review under the Open Government Sunset Review Act. Between 2017 and 2020, the Department received 470 complaints against a guardian or involving a guardian, and 122 public record requests regarding these complaints.[24] The Department indicated that

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[17] "Mental illness" is defined as an impairment of the mental or emotional processes that exercise conscious control of one's actions or of the ability to perceive or understand reality, which impairment substantially interferes with the person's ability to meet the ordinary demands of living. The term does not include a developmental disability as defined in chapter 393, intoxication, or conditions manifested only by antisocial behavior or substance abuse. Section 394.455(28), F.S.

[18] There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 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* Attorney General Opinion 85-62 (August 1, 1985).

[19] Section 744.2104(2), F.S.

[20] Section 744.2111, F.S.

[21] Article I, s. 24(c), FLA. CONST., requires each public record exemption to "state with specificity the public necessity justifying the exemption."

[22] Section 2, Chapter 2017-176, L.O.F.

[23] Section 744.2111(5), F.S.

[24] After review, not all complaints are determined to be legally sufficient and investigated. Email from Derek Miller, Director of Legislative Affairs, Florida Department of Elder Affairs, OSGR- OPPG - S.744.2111, F.S. (Aug. 26, 2021) on file with the Government Operations Subcommittee.

the exemption is functioning well and they are not aware of any litigation concerning the exemption to date. Additionally, the Department has not received any complaints regarding the exemption. The Department recommended the exemption be reenacted as is.

Effect of the Bill

The bill removes the scheduled repeal date of the public record exemption, thereby maintaining the public record exemption for the complaint and any information held by the Department as part of the investigative process of a public or professional guardian. The bill narrows the public record exemption by providing that only photographs and video recordings of a complainant or ward are confidential and exempt from public record requirements. Additionally, the bill provides that an investigation is considered "active" as long as the Department is continuing with a reasonable, good faith belief that the investigation may lead to a finding that a guardian has violated the standards of practice established by the Office. Lastly, the bill reorganizes the section of law for clarity.

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.