The Florida Senate

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Committee on Health, Aging, and Long-Term Care James E. "Jim" King, Jr., President

OPEN GOVERNMENT SUNSET REVIEW OF THE PUBLIC RECORDS EXEMPTIONS FOR THE STATEWIDE PUBLIC GUARDIANSHIP OFFICE (s. 744.7081, F.S.)

SUMMARY

Part IX of ch. 744, F.S., is the "Public Guardianship Act," which created the Office of Statewide Public Guardianship and permits the establishment of local offices of public guardian for the purpose of providing guardianship services for incapacitated persons when no private guardian is available. The Legislature created the office based on findings that private guardianship is inadequate when there is no willing and responsible family member or friend, other person, bank, or corporation available to serve as guardian for an incapacitated person, and when such person does not have adequate income or wealth for the compensation of a private guardian.

Section 744.7081, F.S., requires agencies and the courts to provide medical, financial, or mental health records to the Statewide Public Guardianship Office, upon request by the Office, when such records are necessary to evaluate the public guardianship system, to assess the need for additional public guardianship, or to develop required reports. Any such information that is confidential or exempt under other laws continues to be held confidential or exempt with the Statewide Public Guardianship Office.

Section 744.7081, F.S., further specifies that all records held by the Statewide Public Guardianship Office relating to the medical, financial, or mental health of vulnerable adults as defined in ch. 415, F.S., persons with a developmental disability as defined in ch. 393, F.S., or persons with a mental illness as defined in ch. 394, F.S., shall be confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. This section is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, F.S., and shall stand repealed on October 2, 2004, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 119.15(2), F.S., provides that an exemption is to be maintained only if the exempted record or meeting is of a sensitive, personal nature concerning individuals, the exemption is necessary for the effective and efficient administration of a governmental program, or the exemption affects confidential information concerning an entity. The Open Government Sunset Review Act of 1995 also specifies criteria for the Legislature to consider in its review of an exemption from the Public Records Law.

Senate staff reviewed the exemption pursuant to the Open Government Sunset Review Act of 1995, and determined that the exemption meets the requirements for reenactment.

BACKGROUND

Constitutional Access to Public Records and Meetings

Florida has a history of providing public access to the records and meetings of governmental and other public entities. The tradition began in 1909 with the enactment of a law that guaranteed access to the records of public agencies (s. 1, ch. 5945, 1909; RGS 424; CGL 490). Over the following nine decades, a significant body of statutory and judicial law developed that greatly enhanced the original law. The state's Public Records Act, in ch. 119, F.S., and the public meetings law, in ch. 286, F.S., were first enacted in 1967 (Chs. 67-125 and 67-356, L.O.F.). These statutes have been amended numerous times since their enactment. In November 1992, the public affirmed the tradition of government-in-the-sunshine by enacting a

constitutional amendment which guaranteed and expanded the practice.

Article I, s. 24 of the State Constitution provides every person with the right to 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 persons acting on their behalf. The section specifically includes the legislative, executive and judicial branches of government and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissions or entities created pursuant to law or the State Constitution. All meetings of any collegial public body must be open and noticed to the public.

The term "public records" has been defined by the Legislature in s. 119.011(1), F.S., 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.

This definition of public records has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge. (Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633, 640 (Fla. 1980)). Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form. (Wait v. Florida Power & Light Company, 372 So.2d 420 (Fla. 1979)).

The State Constitution authorizes exemptions to the open government requirements and establishes the means by which these exemptions are to be established. Under Art. I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records and meetings. A law enacting an exemption:

- Must state with specificity the public necessity justifying the exemption;
- Must be no broader than necessary to accomplish the stated purpose of the law;
- Must relate to one subject;
- Must contain only exemptions to public records or meetings requirements; and
- May contain provisions governing enforcement.

Exemptions to public records and meetings requirements are strictly construed because the general purpose of open records and meetings requirements is to allow Florida's citizens to discover the actions of their government. (Christy v. Palm Beach County Sheriff's Office, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997)). The Public Records Act is liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose. (Krischer v. D'Amato, 674 So.2d 909, 911 (Fla. 4th DCA 1996); Seminole County v. Wood, 512 So.2d 1000, 1002 (Fla. 5th DCA 1987), review denied, 520 So.2d 586 (Fla. 1988); Tribune Company v. Public Records, 493 So.2d 480, 483 (Fla. 2d DCA 1986), review denied sub nom., Gillum v. Tribune Company, 503 So.2d 327 (Fla. 1987)).

There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential. If the Legislature makes a record confidential, with no provision for its release such that its confidential status will be maintained, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute. (Attorney General Opinion 85-62.) If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency has discretion to release the record in all circumstances. (Williams v. City of Minneola, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991)).

Under s. 119.10, F.S., any public officer violating any provision of this chapter is guilty of a noncriminal infraction, punishable by a fine not exceeding $500. In addition, any person willfully and knowingly violating any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding $1,000. Section 119.02, F.S., also provides a first degree misdemeanor penalty for public officers who knowingly violate the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, as well as suspension and removal or impeachment from office.

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure. (Department of Professional Regulation v. Spiva, 478 So.2d 382 (Fla. 1st DCA 1985)). For example, the Fourth District Court of Appeal has found that an

exemption for active criminal investigative information did not override discovery authorized by the Rules of Juvenile Procedure and permitted a mother who was a party to a dependency proceeding involving her daughter to inspect the criminal investigative records relating to the death of her infant. (B.B. v. Department of Children and Family Services, 731 So.2d 30 (Fla. 4th DCA 1999)). The Second District Court of Appeal also has held that records that are exempt from public inspection may be subject to discovery in a civil action upon a showing of exceptional circumstances and if the trial court takes all precautions to ensure the confidentiality of the records. (Department of Highway Safety and Motor Vehicles v. Krejci Company Inc., 570 So.2d 1322 (Fla. 2d DCA 1990)).

The Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years. Further, a law that enacts or substantially amends an exemption must state that the exemption must be reviewed by the Legislature before the scheduled repeal date. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd, unless the Legislature acts to reenact the exemption.

In the year before the scheduled repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year which meets the criteria of an exemption as defined in s. 119.15, F.S. An exemption that is not identified and certified is not subject to legislative review and repeal. If the division fails to certify an exemption that it subsequently determines should have been certified, it shall include the exemption in the following year's certification after that determination.

Under the requirements of the Open Government Sunset Review Act of 1995, an exemption is to be maintained only if:

- The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- The exemption is necessary for the effective and efficient administration of a governmental program; or
- The exemption affects confidential information concerning an entity.

As part of the review process, s. 119.15(4)(a), F.S., requires the consideration of the following specific questions:

- 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?

Further, under the Open Government Sunset Review Act of 1995, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption;
- Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals 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 used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves (Memorial Hospital –West Volusia, Inc. v. News-Journal Corporation, 2002WL 390687 (Fla.Cir.Ct)). In addition, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

The Florida Statewide Public Guardianship Program

Public guardianship programs provide guardianship services for incapacitated persons when a private guardianship is not available. A guardian is a surrogate decision-maker appointed by the court to make personal and/or financial decisions either: (1) for an adult with mental or physical disabilities who has been adjudicated incapacitated; or (2) for a minor in circumstances where the parents die or become incapacitated or if a child receives an inheritance, proceeds of a lawsuit, or insurance policy exceeding the amount allowed by statute.

The legal authority for guardianship in Florida is found in ch. 744, F.S. The court rules that control the relationships among the court, the ward, the guardian, and the attorney are found in Part III, Probate Rules, Florida Rules of Court. Together, these statutes and rules describe the duties and obligations of guardians, attorneys, and the courts, to ensure that they act in the best interests of the ward, minor, or individual who is alleged incapacitated.

Adult guardianship is the process by which the court finds an individual's ability to make decisions so impaired that the court gives the right to make decisions to another person. Guardianship is an option only when the court finds no less restrictive alternative; such as durable power of attorney, trust, health care surrogate or proxy, or other form of pre-need directive, to be appropriate and available.

Voluntary and involuntary guardianships are allowed under Florida law. A voluntary guardianship may be established for an adult who, though mentally competent, is incapable of managing his or her own estate and who voluntarily requests the appointment.

Legislative intent establishes that the least restrictive form of guardianship is wanted. Thus, Florida law provides for limited as well as plenary adult guardianship. A limited guardianship is appropriate if the court finds the ward lacks the capacity to do some, but not all, of the tasks necessary to care for his or her person or property; and if the individual does not have pre-planned, written instructions for all aspects of his or her life. A plenary guardian is a person appointed by the court to exercise all delegable legal rights and powers of the adult ward after the court finds an individual to be incapacitated.

Whether the court is dealing with a minor whose assets must be managed by another or an adult with a disability who is not capable of making decisions for him or herself, when the court removes an individual's right to manage his or her own affairs there is an additional duty to protect the individual. One of the court's duties is to appoint a guardian. All adult and minor guardianships are subject to court oversight.

Statewide Public Guardianship Office

Section 744.7021, F.S., created the Statewide Public Guardianship Office, which is housed within the Department of Elder Affairs (DOEA). Local offices, directed by statute, provide guardianship services to persons who do not have adequate income or assets to afford a private guardian and when there is no private guardian willing to serve. The purpose of the legislation was to provide a public guardian only to those persons whose needs could not be met through less drastic means of intervention.

Originally, the Guardianship Office was located in Tampa, Florida, and although created within DOEA, was not subject to control, supervision, or direction by DOEA. The Director of the Office was appointed by the Governor. During the 2003 Legislative Session, the Guardianship Office was moved to DOEA from its location in Tampa. The director is now appointed by the Secretary of DOEA, reports to and serves at the pleasure of the Secretary, and is subject to direction by DOEA. The director has oversight responsibility for all public guardians in the state. The offices of the public guardian were serving 1,584 wards statewide as of September 2003.

Exemptions from Public Records Requirements

Section 744.7081, F.S., specifies that all records held by the Statewide Public Guardianship Office relating to the medical, financial, or mental health of vulnerable adults as defined in ch. 415, F.S., persons with a developmental disability as defined in ch. 393, F.S., or persons with a mental illness as defined in ch. 394, F.S., shall be confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

Section 744.7081, F.S., does not prevent disclosure of the records if they are subpoenaed or if subpoenaed followed by a court order; and does not prevent the records from being used in court.

Section 744.3701(1), F.S., provides that "Unless otherwise ordered by the court, any initial, annual, or final guardianship report or amendment thereto is subject to inspection only by the court, the clerk or the clerk's representative, the guardian and the guardian's attorney, and the ward, unless he or she is a minor or

has been determined to be totally incapacitated, and the ward's attorney." However, s. 744.708(4), F.S., requires guardians to report to the Statewide Public Guardianship Office certain information that may contain the personal medical, financial, and/or mental health information of vulnerable adults.

Notwithstanding any other provision of law to the contrary, any medical, financial, or mental health records held by an agency, or the court and its agencies, which are necessary to evaluate the public guardianship system, to assess the need for additional public guardianship, or to develop required reports, shall be provided to the Statewide Public Guardianship Office upon that office's request. Any confidential or exempt information provided to the Statewide Public Guardianship Office shall continue to be held confidential or exempt as otherwise provided by law.

METHODOLOGY

To complete this review, Senate staff interviewed staff of the state agency responsible for administration of the guardianship program. Results of a survey completed by DOEA staff regarding the necessity for continuation of the current public records exemption were also reviewed.

FINDINGS

Section 119.15(4)(a), F.S., requires that certain questions be answered as part of the review process for a public records or meetings exemption. The review must address the nature of the records, the affected individuals, the public purpose for the exemption, and the availability of the records by alternative means.

What Specific Records or Meetings Are Affected by the Exemption?

The specific records affected by the exemption are the medical, financial, or mental health records of vulnerable adults as defined in ch. 415, F.S., persons with a developmental disability as defined in ch. 393, F.S., or persons with a mental illness as defined in ch. 394, F.S.

Whom Does the Exemption Uniquely Affect, as Opposed to the General Public?

The exemption uniquely affects vulnerable adults as defined in ch. 415, F.S., who need a public guardian."Vulnerable adult" means 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, physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging.

Second, the exemption affects persons with a developmental disability as defined in ch. 393, F.S. "Developmental disability" means a disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely. Third, the exemption affects persons with a mental illness as defined in ch. 394, F.S. "Mental illness" means 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 a person's ability to meet the ordinary demands of living, regardless of etiology. For the purposes of this part, the term does not include retardation or developmental disability as defined in ch. 393, F.S., intoxication, or conditions manifested only by antisocial behavior or substance abuse impairment.

The exemption affects only those person persons who are adjudicated incapacitated as described in the chapters above if:

- There is no family member or friend, other person, bank, or corporation willing and qualified to serve as guardian; and
- The assets of the ward do not exceed the asset level for Medicaid eligibility, exclusive of homestead and exempt property as defined in s. 4, Art. X of the State Constitution, and the ward's income, from all sources, is less than $4,000 per year. Income from public welfare programs, supplemental security income, optional state supplement, a disability pension, or a social security pension shall be excluded in such computation. However, a ward whose total income, counting excludable income, exceeds $30,000 a year may not be served.

What Is the Identifiable Public Purpose or Goal of the Exemption?

The public purpose and goal of this particular public records exemption, as noted above, is to protect the release of personal medical, financial, and mental health information of adults who are unable to make decisions for themselves regarding their medical, financial, and mental health.

Can the Information Contained in the Records Be Readily Obtained by Alternative Means?
According to DOEA, the medical, financial, or mental health records of vulnerable adults as defined in ch. 415, F.S., persons with a developmental disability as defined in ch. 393, F.S., or persons with a mental illness as defined in ch. 394, F.S., cannot be readily obtained from another source.

Continued Necessity for the Exemption
The Legislature has on numerous occasions enacted and reenacted public records exemptions designed specifically to protect against the release of personal medical, financial, and/or mental health information of Floridians.

An exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption protects information of a sensitive personal nature concerning individuals, the release of which information would jeopardize the safety of such individuals.

This particular public records exemption is designed to protect against the release of such information relating to the state's most vulnerable citizens, those who have been adjudicated incapacitated. If such information were not held confidential and exempt, these most vulnerable citizens could fall prey to those seeking to capitalize on their weaknesses.

Also, pursuant to the recommendations of the Governor's Joint Work Group on Guardianship and the Developmentally Disabled contained in their August 6, 2003 Final Report, the statewide Public Guardianship Office may soon become responsible for oversight of guardians of all developmentally disabled persons in Florida. If this happens, maintaining the confidentiality of any medical, financial, and/or mental health information held by the office will become increasingly important.

Can the Exemption be Narrowed?
The exemption does not prevent disclosure of the records if they are subpoenaed or if subpoenaed followed by a court order; and does not prevent the records from being used in court. Thus, the exemption is narrowly tailored, covering only the medical, financial, and mental health records of individuals served by the Statewide Public Guardianship Office.

RECOMMENDATIONS

Staff has reviewed the exemptions in s. 744.7081, F.S., pursuant to the Open Government Sunset Review Act of 1995, and finds that the exemptions meet the requirements for reenactment. The exemptions, viewed against the open government sunset review criteria, do protect information of a sensitive personal nature as documented in files held by the Statewide Public Guardianship Office. The exemptions allow the Statewide Public Guardianship Office to effectively and efficiently administer the guardianship program by assuring the confidentiality of sensitive personal information that could affect those served by the office. Staff finds that the exemption is narrowly tailored to balance the state's strong public policy of open government and the need for assurance of personal privacy for individuals served by the Statewide Public Guardianship Office. Under current law, the exemption protects the medical, financial, and mental health records. Staff recommends that the exemption to the public records requirements in s. 744.7081, F.S., be reenacted without substantive changes.