

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB EEG 23-06 OGSR/Public Guardians/Employees with Fiduciary Responsibility

**SPONSOR(S):** Ethics, Elections & Open Government Subcommittee

**TIED BILLS:**           **IDEN./SIM. BILLS:** SB 7000

| REFERENCE  | ACTION | ANALYST | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|--|--------|---------|--|
| Orig. Comm.: Ethics, Elections & Open<br>Government Subcommittee |        | Poreda  | Toliver                                  |

### SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record exemption 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.

A guardian is someone who is appointed by a court to act on behalf of a ward (an individual who has been adjudicated incapacitated) regarding his or her person or property or both. When a person becomes a ward, that person loses those civil and legal rights which are then transferred to the guardian. When a guardian is given full (plenary) guardianship, the guardian has authority to make all decisions for a ward, such as deciding where the ward lives and whether to sell the ward's property. In Florida, circuit court judges appoint guardians and oversee guardianships. The relationship between a guardian and his or her ward is a fiduciary relationship, meaning that the guardian is under a duty to act for or to give advice for the benefit of the ward upon matters within the scope of the relationship.

Current law provides a public record exemption for certain identifying and location information of current and former public guardians, employees with fiduciary responsibility, spouses and children of these persons, as well as the places of employment of those spouses and children and the names and locations of schools and day care facilities attended by the children of those persons.

The bill saves from repeal the public record exemption for certain identifying and location information including home addresses, telephone numbers, and dates of birth of current and former public guardians, employees with fiduciary responsibility, and their spouses and children. The bill also narrows the exemption by removing *places of employment* and *photographs of current* public guardians and employees with fiduciary responsibility from the exemption. Lastly, the bill provides definitions for certain terms and clarifies that the spouses and children of public guardians or employees with fiduciary responsibility are not entitled to the public records exemption if they themselves are a public guardian or employee with fiduciary responsibility. The exemption will repeal on October 2, 2023, if this bill does not become law.

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Open Government Sunset Review Act

The Open Government Sunset Review Act (OGSR Act)<sup>1</sup> 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.<sup>2</sup>

The OGSR 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.<sup>3</sup>

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>4</sup> 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.

##### Guardianship

A guardian is someone who is appointed by a 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>5</sup> Adjudicating a person totally incapacitated and in need of a guardian deprives a person of his or her civil and legal rights;<sup>6</sup> accordingly, the Legislature has recognized that the least restrictive form of guardianship should be used to ensure the most appropriate level of care and the protection of such person's rights.<sup>7</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>8</sup> Once a person has been adjudicated incapacitated, such a person becomes a "ward," the court appoints a guardian, and letters of guardianship are issued.<sup>9</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>10</sup>

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<sup>1</sup> Section 119.15, F.S.

<sup>2</sup> Section 119.15(3), F.S.

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

<sup>4</sup> Article I, s. 24(c), FLA. CONST.

<sup>5</sup> Section 744.102(9), F.S.

<sup>6</sup> Section 744.1012(1), F.S.

<sup>7</sup> Section 744.1012(2), F.S.

<sup>8</sup> Section 744.3201, F.S.

<sup>9</sup> Sections 744.3371-744.345, F.S.

<sup>10</sup> Section 744.2005, F.S.

The relationship between a guardian and his or her ward is a fiduciary relationship,<sup>11</sup> meaning that the guardian is under a duty to act for or give advice for the benefit of the ward upon matters within the scope of the relationship. The guardian, as fiduciary, must:<sup>12</sup>

- 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.

The fiduciary relationship which exists between the guardian and the ward may not be used for the private gain of the guardian other than the remuneration for fees and expenses provided by law.<sup>13</sup> There are 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.<sup>14</sup>

### 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>15</sup> In 2016, the Legislature renamed the Statewide Public Guardianship Office within the Department of Elder Affairs (DOEA) as the Office of Public and Professional Guardians (OPPG) and expanded the OPPG's responsibilities.<sup>16</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>17</sup> A public guardian may be an appointee of the OPPG or a contract employee of a nonprofit corporation.<sup>18</sup> There are 16 public guardianship programs, overseeing approximately 550 professional guardians statewide with offices located in all 20 judicial circuits in the state.<sup>19</sup>

### Public Record Exemption under Review

In 2018, the Legislature made the following information of current or former public guardians and employees with fiduciary responsibility<sup>20</sup> exempt<sup>21</sup> from public record requirements:<sup>22</sup>

- Home addresses;
- Telephone numbers;
- Dates of birth;
- Places of employment; and
- Photographs.

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<sup>11</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. *See Lawrence v. Norris*, 563 So. 2d 195, 197 (Fla. 1st DCA 1990)

<sup>12</sup> Section 744.361, F.S.

<sup>13</sup> Section 744.446, F.S.

<sup>14</sup> Section 744.362, F.S.

<sup>15</sup> Chapter 99-277 L.O.F.

<sup>16</sup> Section 744.2001, F.S. and ch. 2016-40 L.O.F.

<sup>17</sup> Section 744.2007(1), F.S.

<sup>18</sup> Section 744.2006, F.S.

<sup>19</sup> DEPARTMENT OF ELDER AFFAIRS, *Florida Public Guardian Programs*, <https://elderaffairs.org/programs-services/office-of-public-professional-guardians-oppg/> (last visited February 17, 2023).

<sup>20</sup> "Employee with fiduciary responsibility" means an employee of a public guardian who has the ability to direct any transactions of a ward's funds, assets, or property; who under the supervision of the guardian, manages the care of the ward; or who makes any health care decision, as defined in s. 765.101, on behalf of the ward. Section 744.21031, F.S.

<sup>21</sup> 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).

<sup>22</sup> Section 744.21031, F.S.

The exemption also protects the same information for spouses and children of such persons, as well as the names of the spouses and children of a public guardian or employee with fiduciary responsibility. Additionally, the names and locations of schools and day care facilities attended by the children of a public guardian or employee with fiduciary responsibility are exempt from public record requirements.<sup>23</sup>

The 2018 public necessity statement<sup>24</sup> for the exemption provides that:

The release of such identifying and location information might place current or former public guardians and employees with fiduciary responsibility and their family members in danger of physical and emotional harm from disgruntled individuals who react inappropriately to actions taken by the public guardians and employees with fiduciary responsibility. Public guardians and employees with fiduciary responsibility provide a valuable service to the community by helping some of the state's most vulnerable residents who lack the physical or mental capacity to take care of most aspects of their own personal affairs. Public guardians and employees with fiduciary responsibility help those who lack a willing and qualified family member or friend and who do not have the income or assets to pay a professional guardian.

Despite the value of this service, however, some persons, including a public guardian's own wards, become disgruntled with the assistance provided or the decisions a public guardian or an employee with fiduciary responsibility makes, which can result in a guardian or an employee with fiduciary responsibility or the family members of the guardian or the employee with fiduciary responsibility becoming potential targets for an act of revenge.<sup>25</sup>

Pursuant to the OGSR Act, the exemption will repeal on October 2, 2023, unless reenacted by the Legislature.

During the 2022 interim, House and Senate staff met with DOEA staff regarding the public records exemption under review. DOEA staff stated that the exemption has only been utilized by one of the Offices of the Public Guardian since its inception. DOEA staff was unaware of any litigation concerning the exemption and expressed the need to maintain the exemption. DOEA also expressed support for narrowing the exemption.

### **Effect of the Bill**

The bill maintains the public record exemption for the home address, telephone numbers, and dates of birth of current and former public guardians and employees with fiduciary responsibility. The bill also maintains the public record exemption for the names, home addresses, telephone numbers, dates of birth of the spouses and children of current and former public guardians and employees with fiduciary responsibility, as well as the names and locations of schools and daycare facilities attended by such children.

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<sup>23</sup> *Id.*

<sup>24</sup> Article I, s. 24(c), FLA. CONST., requires each public record exemption state with specificity the public necessity justifying the exemption.

The bill makes the following changes to the public record exemption:

- Adds definitions for the terms “agency”<sup>26</sup> and “telephone numbers.”<sup>27</sup>
- Removes *places of employment* of current and former public guardians, employees with fiduciary responsibility, and the spouses and children of such persons from the exemption.
- Removes *photographs of current* public guardians and employees with fiduciary responsibility from the public record exemption but maintains the exemption for photographs of *former* public guardians and employees with fiduciary responsibility.
- Clarifies that the spouses and children of public guardians or employees with fiduciary responsibility are not entitled to the public record exemption if they themselves are a public guardian or employee with fiduciary responsibility.

The bill removes the scheduled repeal date of the public record exemption, thereby maintaining the public record exemption.

**B. SECTION DIRECTORY:**

Section 1 amends s. 744.21031, F.S., relating to the public records exemption for public guardians.

Section 2 provides for an effective date of October 1, 2023.

**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:**

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<sup>26</sup> “Agency” means any state, county, district, 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. Section 119.011(2), F.S.

<sup>27</sup> “Telephone numbers” includes home telephone numbers, personal cellular telephone numbers, personal pager telephone numbers, and telephone numbers associated with personal communications devices. Section 119.071(4)(d)1.b., F.S.

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties and municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties and municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill neither requires rulemaking nor confers or alters an agency's rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

Not applicable.