

**CONFIDENTIAL**  
**LEGISLATIVE BILL REVIEW FORM: 2016**

Bill Number: H.112 Name of Bill: An act relating to access to financial records in adult protective services investigations

Agency/ Dept: DAIL Author of Bill Review: Stuart Schurr

Date of Bill Review: March 15, 2016 Related Bills and Key Players : Rep. Ann Pugh, Sponsor

Status of Bill: (check one): ☐ Upon Introduction ☒ As passed by 1<sup>st</sup> body ☐ As passed by both

Recommended Position:

☒ Support ☐ Oppose ☐ Remain Neutral ☐ Support with modifications identified in #8 below

**Analysis of Bill**

**1. Summary of bill and issue it addresses.** *Describe what the bill is intended to accomplish and why.*

Financial records are critical elements of an APS investigation. They are often the best evidence to demonstrate that exploitation has occurred. The ability to access an alleged victim's records is often essential to ensure that a comprehensive investigation is conducted and to facilitate the protection of vulnerable adults from abuse, neglect, or exploitation. Perhaps even more significantly, early access to these records can further enable APS investigators to take the necessary steps to prevent further exploitation before funds are irretrievably lost.

As passed by the House, this bill gives authority to financial institutions to release records of an account holder to APS. DAIL believes that this bill strikes the appropriate balance between the investigator's need for the information contained in the records and the vulnerable adult's right to privacy and self-determination.

Despite the importance of these records, APS investigators are often unable to get them in a timely manner.

§6915(b)(1) would require a financial institution to release an alleged victim's (AV) records when:

- The AV/account holder with capacity consents; or
- The guardian or agent under a power of attorney (POA) consents

Why is the above section needed? Even when an AV with capacity to consent authorizes the release of these records, some financial institutions are hesitant to release them to the investigator. Even if eventually done, there may be delays while the institution determines whether the consent is legitimate. To resolve this first issue, this bill creates the authority under which the institution can comfortably release these records upon request. Institutions will be authorized to release records when consent is given by an account holder with capacity. If the account holder fails to give consent, the records shall not be pursued or released.

There are also times when records are needed and the account holder/AV does not have capacity to consent. If the guardian or agent of an AV without capacity is asked to consent and refuses to do so, the bill would authorize APS to file a petition with the court to compel consent to the release.

Notwithstanding the above, the available court processes may not be adequate to address some of the time-sensitive circumstances presented in cases of financial exploitation. And that is the significance of the language contained in §6915 (b)(2).

- If the individual lacks capacity and does not have a guardian, this bill could, *under very limited and narrow circumstances set forth in §6915 (b)(2)*, permit the financial institution to release its account holder's records without court intervention.

Without the language contained in §6915 (b)(2), a petition must be filed and lengthy delays can occur before a guardian is appointed and consent for the release of the AV's financial records can be obtained. In the interim, exploitation can continue, and APS lacks the ability to identify with any degree of certainty the nature or extent of the exploitation for the institutions that would have the ability to cease the ongoing impact to the financial resources of the AV. (Note: once the funds are gone, they are gone; restitution is not available and financial institutions may not make the account holder "whole").

- This bill looks to focus, however, on those rare cases where the AV/account holder lacks capacity and HAS a guardian or agent under a POA, and it is their guardian or agent (i.e., the individual with a fiduciary duty to the AV and access to the account of the AV, who is also aware of the schedule of deposited benefits into the AV's account), who is believed and reported to be the alleged perpetrator (AP). In those cases, it is only natural that a guardian /agent of the AV, who is aware of their own misconduct, would be unwilling to consent to the timely disclosure of records. In addition, there may be times when it would be detrimental to the APS case and to the ability to identify the AP if APS were required to alert the AP by requesting access to the AV's financial records.

If an alleged victim lacks capacity and has no guardian or agent under a POA, or if the alleged victim has a guardian or agent who is the alleged perpetrator, the financial institution must promptly provide to the APS investigator the alleged victim's financial records if the APS investigator produces a statement which asserts all of the following:

- The account holder is an alleged victim of abuse, neglect, or exploitation;
- The alleged victim lacks capacity to consent
- Law enforcement is not involved in the investigation or has not requested a subpoena for the records;
- The alleged victim will suffer imminent harm if the investigation is delayed while the investigator seeks a court order;
- Immediate enforcement activity that depends on the records would be affected by waiting until the alleged victim regains capacity to consent; and
- The DAIL Commissioner has confirmed that the above conditions have been met and that disclosure is necessary to protect the alleged victim.

So, while a court process exists to obtain these records from a guardian or agent who refuses to consent, it may not always be appropriate to initiate that process. It is also a fact that seeking a court order to modify or terminate a guardianship or to obtain an order for the release of financial records takes a significant amount of time. There is no mechanism for an emergency motion to modify or terminate, and the courts are not inclined or equipped to grant such requests for expedited action. So, while the investigator waits for a court order, the guardian/agent continues to drain assets from the account to which he/she has access through ATM withdrawals and EBTs and charging the AV's account for services and utilities not even provided for the benefit of the AV.

Further, to encourage greater coordination of efforts between state agencies, the bill provides that the DAIL Commissioner may share the APS investigative report with the Commissioner of Financial Regulation when the DAIL Commissioner deems it appropriate for an investigation related to financial exploitation.

Is there a need for this bill? *Please explain why or why not.*

*Please return this bill review as a Microsoft Word document to [Jahala.Dudley@vermont.gov](mailto:Jahala.Dudley@vermont.gov) & [Jessica.Mishaan@vermont.gov](mailto:Jessica.Mishaan@vermont.gov)*

Without the statutory authority provided in H.112, access to an alleged victim's financial records can be delayed or denied inappropriately during the course of an investigation, thereby limiting the scope of the investigation and potentially undermining the ability of APS to facilitate protection of vulnerable adults in Vermont. Delays in obtaining relevant records could materially and adversely impact the collection of evidence critical to the APS investigation.

There is often a need to obtain an alleged victim's financial records on an emergency basis. Where a guardian or agent under a power of attorney is the alleged perpetrator and refuses to provide consent to the release of the alleged victim's records, the procedures outlined in this bill could be utilized. Without this provision, an investigator would be required to petition the court to review the guardian/agent's refusal, during which time the alleged victim may likely suffer ongoing harm and the investigation may be materially and adversely impacted.

**2. What are likely to be the fiscal and programmatic implications of this bill for this Department?**

The proposed legislation is not anticipated to have a significant fiscal impact for the Department. If this proposed legislation is enacted, the APS training program would be modified to include specific training regarding the collection of an alleged victim's records. To the extent that a change in the APS training program increases training costs, those costs are anticipated to be de minimis.

As passed by the House, the financial institution would have the option of charging DAIL no more than the actual cost of providing the records to the APS investigator. The financial institution shall not charge DAIL if the financial institution would not charge had the request come directly from the account holder.

**3. What might be the fiscal and programmatic implications of this bill for other departments in state government, and what is likely to be their perspective on it?**

The proposed legislation is not anticipated to have a fiscal impact on other departments.

**4. What might be the fiscal and programmatic implications of this bill for others, and what is likely to be their perspective on it? (for example, public, municipalities, organizations, business, regulated entities, etc)**

The costs associated with processing documents for production to APS would result in a fiscal impact to the custodian of records (i.e., financial institutions), unless the cost is passed onto DAIL. The financial institutions would also be required to comply with the order/request within the time specified in the statute. Both the Vermont Bankers' Association and the Credit Unions support the version as passed by the House, as it provides the protections they desire to in order to disclose requested records of which they are the custodian.

**5. Other Stakeholders:**

**5.1 Who else is likely to support the proposal and why?**

The proposed legislation is likely to be supported by organizations and individuals that advocate for vulnerable adults, such as the Area Agencies on Aging, the Long Term Care Ombudsman and Vermont Legal Aid: Senior Citizens Law Project.

**5.2 Who else is likely to oppose the proposal and why?**

While it had been anticipated that the Vermont ACLU might oppose, believing that the process might violate an alleged perpetrator's privacy rights, the ACLU did not oppose the bill in the House. Wells Fargo Bank only recently weighed in to propose that the statute clearly define "financial records." While there is some benefit in providing greater clarity as to what records the financial institution would be required to produce, the Vermont Bankers' Association opposes the inclusion of a definition, asserting that it has a history of working well with the State and such a definition is unnecessary.

6. **Rationale for recommendation:** *Justify recommendation stated above.*

See #2 above.

7. **Specific modifications that would be needed to recommend support of this bill:** *Not meant to rewrite bill, but rather, an opportunity to identify simple modifications that would change recommended position.*

None. The proposed re-draft reflects the Department's position.

8. **Will this bill create a new board or commission AND/OR add or remove appointees to an existing one? If so, which one and how many?**

No.

**Secretary/Commissioner has reviewed this document:** \_\_\_\_\_ **Date:** \_\_\_\_\_