

Testimony before House Human Services
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H.112, An act relating to access to financial records in adult protective services investigations

Stuart Schurr, General Counsel,
Department of Disabilities, Aging and Independent Living

Thank you for the opportunity to testify on this bill. As you know, this bill was introduced last year. During testimony before this committee it became apparent that there were a number of concerns about the language in the bill. As a result, the stakeholders met both during the session and this past fall to discuss those concerns and attempt to reach consensus. The result of those meetings is the proposed draft before you. While I am under no illusion that this is agreeable to all concerned, I am happy to report that this has been circulated to all of the identified interested parties and we have heard no opposition to date.

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 now proposed, this bill gives authority to financial institutions to release records of an account holder to APS. As I will discuss later, this language is not inconsistent with statutory authority granted in other states. 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.

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 this section needed?

- A. 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.
- B. 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.**
- C. 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), that 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.

So, while you will hear that 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, 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.

Examples: Highlight importance of timeliness of access

#1

AV in hospital ICU;

Neighbor, who had been handling her mail during her prolonged hospital stay, noted that several of AV's utility payments had been returned for NSF;

AV contacted her credit union and learned that approx. \$1,500 had been withdrawn from her account in last 20 days;

AV's only debit card was hidden in her home;

Credit union honored the AV's consent for release of records to APS;

APS discovered withdrawals were being made at a convenience store ATM;

APS went to the convenience store and soon discovered that although there was no camera on the ATM machine, the convenience store had a security camera that captured the ATM machine area and the identity of the individual making the unauthorized withdrawal.

The AP was the AV's relative and admitted to the theft.

That security camera footage was due to be overwritten within a matter of days

If AV had lacked capacity to consent and had a guardian who was the AP, and APS had been required to obtain a court order for the credit union records as a result of the guardian's refusal to consent, the delay in APS' ability to review the records and identify the convenience store, to get the time lapse footage from the store before its destruction, and to identify the AP, would likely have resulted in further exploitation and an inability to substantiate the allegations.

#2

AV is a resident of a NF

AV learns that her recent payment to the NF was returned for NSF

AV contacted her financial institution and learned that \$7,600 in POS transactions had been conducted online in last 30 days (e.g., Amazon, iTunes, ebay)

APS was able to review bank records and work with one of the POS vendor sites to ID the shipping address (in same city as AV's NF) for purchased items.

APS went to the shipping address location that day and found packages fraudulently charged to AV's accounts and identified the perpetrator as AV's relative.

If AV had lacked capacity to consent and had a guardian who was the suspected AP, and APS had been required to obtain a court order for the bank records as a result of the guardian's refusal to consent, the delay in APS' ability to review the records and identify POS vendors, to work with the POS vendor site to determine the location of, and retrieve, the delivered packages, and to identify the AP, would likely have resulted in further fraudulent charging.

So, while this bill preserves the ability to seek court intervention, and such a process could continue to be used when appropriate, it also provides for the opportunity to obtain from a financial institution an AV's records when:

the AV lacks capacity to consent and the investigator issues a statement asserting that the AV will suffer imminent harm if there is a delay to obtain a court order.