

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1351 Pub. Rec./Guardianship Data Transparency

SPONSOR(S): Health & Human Services Committee, Children, Families & Seniors Subcommittee, Chaney and others

TIED BILLS: CS/HB 1349 **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	11 Y, 0 N, As CS	Morris	Brazzell
2) State Affairs Committee	20 Y, 0 N	Landry	Williamson
3) Health & Human Services Committee	17 Y, 0 N, As CS	Morris	Calamas

SUMMARY ANALYSIS

When an individual is unable to make legal decisions regarding his or her person or property, a guardian may be appointed by the court to act on his or her behalf. A person served by a guardian is a ward, and a guardian may oversee a ward's person or property or both. When a person becomes a ward, that person loses those civil and legal rights 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 to sell the ward's property.

Various task forces, and situations where guardians made adverse and unethical decisions regarding wards, have highlighted the lack of data regarding Florida's guardianship system. A recent task force found that basic information, such as the number of wards in the state, is unavailable.

The bill creates a public record exemption for personal identifying information of a ward or petitioner held by the Florida Association of Court Clerks and Comptrollers, Inc., and the clerks of court in the guardianship database created under CS/HB 1349, to which this bill is linked. Such information may be released to another governmental entity for use in the performance of its official duties and responsibilities.

The bill provides a public necessity statement as required by the Florida Constitution and provides that the public record exemption will stand repealed on October 2, 2027, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill may have an insignificant fiscal impact on the Florida Clerks of Court Operations Corporation and the clerks of court.

The effective date of the bill is contingent upon the passage of CS/CS/CS/HB 1349 or similar legislation.

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public Records

Article I, s. 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Art. I, s. 24(a) of the Florida Constitution.¹ The general law must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish its purpose.²

The Florida Statutes also address the public policy regarding access to government records. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt. Furthermore, the Open Government Sunset Review Act³ provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than necessary to meet one of the following purposes:⁴

- 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; or
- Protect trade or business secrets.

The Open Government Sunset Review Act requires the automatic repeal of a newly created or substantially amended public record exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.⁵

Guardianship

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.⁶ There are two main forms of guardianship: guardianship over the person or guardianship over the property, which may be limited or plenary.⁷ 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.⁸

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

¹ Art. I, s. 24(c), Fla. Const.

² Id.

³ Section 119.15, F.S.

⁴ Section 119.15(6)(b), F.S.

⁵ Section 119.15(3), F.S.

⁶ Section 744.102(9), F.S.

⁷ Section 744.2005, F.S.

⁸ Section 744.102(12), F.S.

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, 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.⁹

Regulation of Public and Professional Guardians

The Legislature created the Statewide Public Guardianship Office in 1999 to provide oversight over all public guardians.¹⁰ 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.¹¹ The expansion of the Office's oversight of professional guardians followed reports of abuse and inappropriate behavior by professional guardians.¹² The Office now regulates professional guardians with certain disciplinary and enforcement powers.¹³ 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.¹⁴

Any confidential or exempt information provided to the Office must continue to be held confidential or exempt as otherwise provided by law.¹⁵ All records held by the Office relating to the medical, financial, or mental health of vulnerable adults,¹⁶ persons with a developmental disability,¹⁷ or persons with a

⁹ Section 744.102(17), F.S.

¹⁰ Chapter 99-277 L.O.F.

¹¹ See CS/CS/CS/SB 232 (2016) and Chapter 2016-40, L.O.F.

¹² 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 Jan. 21, 2022) (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)

¹³ Section 744.2004, F.S.

¹⁴ Section 744.2111, F.S.

¹⁵ *Id.*

¹⁶ "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.

¹⁷ "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,¹⁸ are confidential and exempt¹⁹ from s. 119.07(1), F.S., and Article I, s. 24(a) of the State Constitution.²⁰

Office of Public and Professional Guardians

While the court appoints guardians to wards, the Department of Elder Affairs (DOEA) regulates professional guardians to ensure they receive required training and comply with standards of practice.

In 1999, the Legislature created the “Public Guardianship Act” and established the Statewide Public Guardianship Office within DOEA.²¹ In 2016, the Legislature renamed the Statewide Public Guardianship Office within the DOEA as the Office of Public and Professional Guardians (OPPG) and required OPPG to regulate professional guardians. The OPPG appoints local public guardian offices to provide guardianship services to people who have neither adequate income nor assets to afford a private guardian, nor any willing family or friend to serve.

There are 17 public guardian offices that serve all 67 counties.²² In fiscal year 2018-2019, the public guardian offices served 3,816 wards.²³ Currently, there are more than 550 professional guardians registered with the OPPG.²⁴

The executive director of the OPPG is responsible for the oversight of all public and professional guardians. In addition to other oversight responsibilities for professional guardians, the executive director must review and approve professional guardian annual registration, which must include:²⁵

- Sufficient information to identify the professional guardian which includes:
 - For a professional guardian who is a natural person: the name, address, date of birth, and employer identification or social security number²⁶ of the person; and
 - For a professional guardian which is a partnership or association: the name, address, and employer identification number of the entity.
- Documentation proving bonding and education requirements have been met; and
- Information distinguishing the type of guardianship services provided (public guardian, individually, through partnership, corporation, or other business entity).

Similarly, the executive director of the OPPG is required to oversee the functions of public guardians.²⁷

OPPG does not have a role in the appointment of a guardian to an individual ward, or in removing a guardian from service to any ward; such decisions are made by the court.

Discipline of Professional Guardians

¹⁸ “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.

¹⁹ 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).

²⁰ Section 744.2104(2), F.S.

²¹ Section 744.701, F.S. (1999).

²² Florida Department of Elder Affairs, 2020 Summary of Programs and Services, available at https://elderaffairs.org/wp-content/uploads/2020_SOPS_C.pdf (last visited Jan. 21, 2022).

²³ *Id.*

²⁴ Office of Public and Professional Guardians, Department of Elder Affairs, <https://elderaffairs.org/programs-services/office-of-public-professional-guardians-oppg/> (last visited Jan. 21, 2022).

²⁵ S. 744.2002(3), F.S.

²⁶ Social Security numbers are confidential and exempt under s. 119.07, F.S.

²⁷ S. 744.2001(4), F.S.

OPPG receives and investigates complaints against professional guardians.²⁸ When investigating complaints, OPPG must:

- Initiate an investigation no later than 10 business days after OPPG receives a complaint;
- Complete and provide initial investigative findings and recommendations, if any, to the professional guardian and person filing the complaint within 60 days;
- Obtain supporting information, including interviewing the ward, family member, or interested party, or documentation to determine the legal sufficiency²⁹ of a complaint;
- Dismiss any complaint that is not legally sufficient; and
- Coordinate with the clerks of the court to avoid duplication of duties.

Disciplinary action may be taken against a professional guardian for:³⁰

- Making a misleading, deceptive, or fraudulent representation in or related to the practice of guardianship;
- Violating any rule governing guardians or guardianship adopted by OPPG;
- Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to a crime which relates to the practice of, or ability to practice as, a professional guardian;
- Failing to comply with the educational course requirements for professional guardians;
- Having a registration, license, or authority to practice a regulated profession revoked;
- Knowingly filing a false report or complaint with OPPG against another guardian;
- Attempting to obtain, obtaining, or renewing a registration or license to practice a profession by bribery, fraud, or a known error;
- Failing to report a violation of ch. 744, F.S. or the rules of OPPG to OPPG;
- Failing to perform a legal or statutory obligation;
- Making or filing a false report that is signed in the person's capacity as professional guardian;
- Using the position of guardian for financial gain;
- Violating or failing to comply with an order from OPPG;
- Improperly interfering with an investigation;
- Using the guardianship relationship to engage or attempt to engage in sexual activity;
- Failing to report to OPPG within 30 days being convicted or found guilty of, or enter a plea of guilty or nolo contendere to a crime;
- Being unable to perform the functions of guardian;
- Failing to post and maintain a blanket fiduciary bond;
- Failing to maintain all records relating to a guardianship for specified time; or
- Violating any provision of ch. 744, F.S., or any rules adopted thereunder.

When OPPG finds that a professional guardian is guilty of any of the grounds for discipline, it may take action against that guardian by entering an order imposing one or more penalties on the professional guardian. When determining what action is appropriate against a professional guardian, prior to consideration of any mitigation or rehabilitation for the professional guardian, OPPG must first consider what sanctions are necessary to safeguard the wards and protect the public. The disciplinary guidelines should specify a meaningful range of penalties based on the severity and repetition of offenses and that minor violations should be treated differently than those which endanger the ward or the public. OPPG may impose any combination of the following sanctions:³¹

- Refuse to register an applicant as a professional guardian;
- Suspend or revoke of a professional guardian's registration;
- Issue of a reprimand;
- Require treatment, completion of continuing education courses, or reexamination;

²⁸ S. 744.2004, F.S.

²⁹ A complaint is legally sufficient if it contains ultimate facts that show a violation of a standard of practice by a professional guardian has occurred.

³⁰ S. 744.20041, F.S.

³¹ Id.

- Require restitution; or
- Require remedial education.

If the final determination from a disciplinary proceeding is to suspend or revoke the guardian's registration, the determination must be provided to any court that oversees any guardianship to which the professional guardian is appointed.³²

OPPG is required to report any suspected abuse, neglect or exploitation of a vulnerable adult as a result of a complaint, or investigation of a complaint, to the Department of Children and Families' central abuse hotline.³³

Guardianship Data in Florida

Several task forces have highlighted the challenge of serving wards without available data, regionally and statewide.

For instance, the 2014 Restoration of Capacity Study and Work Group Report stated:

There is little uniform data collected on guardianships in Florida. The Office of the State Courts Administrator reports at the state level only the number of guardianships filed in a given year and the dispositions of those cases. The state does not keep a record of the total number of persons under guardianship, whether the guardianship is plenary or partial, the nature of the disability of the person under guardianship, or a host of other data crucial to making informed decisions about systems change. Additionally, there is neither central reporting of the number of Suggestions of Capacity filed nor restoration outcomes in general.³⁴

A 2022 report by a task force convened by the Florida Court Clerks and Comptrollers Association, including wards, guardians, attorneys, legislators, courts, and clerks of court, recommended the creation of a statewide data collection system for all guardianship cases. The task force found that Florida has little statewide formalized guardianship case data collection or sharing processes in place and that much of the needed information exists in the 67 separate Florida county clerks of court case maintenance systems.

According to the task force report, the purpose for creating a statewide data collection system for all guardianship cases is to provide meaningful and objective data for improvements to the guardianship system, while increasing the public trust with the transparency of non-confidential information. The task force report also recommended that judicial circuits collect and report a variety of data, such as the existence of advance directives, powers of attorney, health care surrogate designations, and other similar legal documents; and guardianship case information and changes.³⁵

³² Id.

³³ S. 744.2004(5), F.S.

³⁴ Florida Developmental Disabilities Council, *Restoration of Capacity Study and Work Group Report*, Feb. 28, 2014, <https://www.flcourts.org/content/download/404570/file/Restoration-of-Capacity-Study-and-Work-Group-Report-2014.pdf>

³⁵ Florida Clerks of Court and Comptrollers, *Guardianship Improvement Task Force Final Report*, Jan. 2022

<https://guardianshiptf.wpengine.com/wp-content/uploads/2022/01/GITFRreport-Jan2022.pdf>.

Florida Clerks of Courts Corporation

In 2003, the Legislature created the Florida Clerks of Court Operations Corporation (CCOC).³⁶ All clerks of the circuit court are members of the CCOC, and the CCOC's duties are performed by an executive council composed of eight clerks and three ex officio members designated by the President of the Senate, the Speaker of the House of Representatives, and the Chief Justice of the Supreme Court.³⁷ The CCOC's tasks include:³⁸

- Recommending changes in the amounts of various court-related fines, fees, service charges, and costs established by law to ensure that clerks have reasonable and adequate funding to perform their court-related functions;
- Developing and certifying a uniform system of workload measures and workload standards for court-related functions;
- Contracting with the Department of Financial Services (DFS) for audit of the court-related expenditures of individual clerks; and
- Approving the clerks' proposed budgets.

Current law does not require the CCOC to develop and maintain a guardianship database, nor is such database confidential and exempt from public record requirements.

CS/HB 1349 (2022)

CS/HB 1349, to which this bill is linked, requires the Florida Clerks of Court Operations Corporation and the clerks of court to collect specified information regarding wards, guardians, cases, and related details for a statewide database accessible by each circuit court. The bill requires the database to include, at a minimum:

- The registration and disciplinary data of each professional guardian provided by the OPPG;
- Information regarding the status of each guardian's compliance with the statutory qualifications for guardianship; and
- The status of statutorily required reports and submissions.

Additionally, the bill requires the OPPG to publish profiles of each registered professional guardian on its website, which must include, at a minimum:

- Information submitted to the OPPG under s. 744.2002, F.S.;
- Whether or not any substantiated complaints have been made against the professional guardian; and
- Any disciplinary actions taken by DOEA against the professional guardian.

Effect of the Bill

Public Records

The bill creates a public record exemption for personal identifying information of a ward or petitioner held by the Florida Clerks of Court Operations Corporation and the clerks of court in the guardianship database created under CS/HB 1349 (2022). The confidential and exempt³⁹ information may be released to another governmental entity for use in the performance of its official duties and responsibilities.

³⁶ Ch. 2003-402, Laws of Fla.

³⁷ S. 28.35, F.S.

³⁸ S. 28.35(2), F.S.

³⁹ 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

The bill provides a public necessity statement as required by the Florida Constitution, specifying that the exemption is necessary because the public disclosure of sensitive information could lead to abuse or exploitation of vulnerable citizens and avoiding exploitation or abuse is a reason why guardianships are sought for such individuals.

The bill provides that the public record exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2027, unless saved from repeal by reenactment by the Legislature.

This bill provides that the act takes effect on the same date that CS/CS/CS/HB 1349 or similar legislation takes effect, if such legislation is adopted in the same legislative session, or an extension thereof, and becomes law. CS/HB 1349 has an effective date of July 1, 2022.

B. SECTION DIRECTORY:

Section 1: Amends s. 744.2112, F.S., relating to guardianship data collection and transparency.

Section 2: Provides a public necessity statement as required by the Florida Constitution.

Section 3: Provides that the bill is effective on the same day that CS/CS/CS/HB 1349 (2022) or similar legislation takes effect.

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:

The bill may have a fiscal impact on the Florida Clerks of Court Operations Corporation and the clerks of court responsible for complying with public records requests and redacting confidential and exempt information prior to releasing a record. Such costs, however, would be absorbed as they are part of the day-to-day responsibilities of the clerks.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

Vote Requirement

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill includes a public necessity statement for each newly created exemption in the bill.

Breadth of Exemption

Article I, s. 24(c) of the Florida Constitution requires a newly created or expanded public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law.

The bill provides that the exemption is necessary because the public disclosure of sensitive information could lead to abuse or exploitation of vulnerable citizens and avoiding exploitation or abuse is a reason why guardianships are sought for such individuals.

B. RULE-MAKING AUTHORITY:

Current law provides sufficient rulemaking authority to implement the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On February 3, 2022, the Children, Families & Seniors Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Protects data held in a database established by the Florida Association of Court Clerks and Comptrollers, Inc., and the clerks of court;
- Provides a public necessity statement; and
- Requires an Open Government Sunset Review in 2027, and repeals the exemption at that time, unless saved from repeal by the Legislature.

On February 28, 2022, the Health and Human Services Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment protects data held in a database established by the Florida Clerks of Court Operations Corporation instead of the Florida Association of Court Clerks and Comptrollers, Inc.

This analysis is drafted to the committee substitute as passed by the Health and Human Services Committee.