

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: SB 724

INTRODUCER: Senator Joyner

SUBJECT: Public Records

DATE: January 15, 2016

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------------------|
| 1. | Kim | McVaney | GO | Pre-meeting |
| 2. | | | ACJ | |
| 3. | | | AP | |

I. Summary:

SB 724 makes the public records custodian, including the elected or appointed officer heading the agency, personally liable for the reasonable costs of enforcement, including attorney fees, if a court finds the agency or custodian:

- Unlawfully refused to permit a public record to be inspected or copied; and
- Knowingly asserted a claim or defense that was not supported by facts.

The bill becomes law on July 1, 2016.

II. Present Situation:

Public Records

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.¹ This applies to the official business of any public body, officer or employee of the state, including all three branches of state government, local governmental entities and any person acting on behalf of the government.²

In addition to the Florida Constitution, the Florida Statutes provides that the public may access legislative and executive branch records.³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁴ The Public Records Act states that

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(a).

³ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature's records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

⁴ Public records laws are found throughout the Florida Statutes.

it is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁵

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁶ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”⁷

Custodian of Public Records

Pursuant to s. 119.011(5), F.S., a custodian of public records is “the elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records, or his or her designee.”

A custodian of public records is required to perform statutorily required duties such as maintaining records in fireproof vaults, repairing records and comply with retention schedules set by the Department of State.⁸ In addition, s. 119.07, F.S., provides that public records custodian has additional duties which include:

- Acknowledging a public records request and responding to those requests in good faith;⁹
- Producing records after redacting exempt information or provide the statutory citation for an exemption if the entire document is exempt;¹⁰
- Maintaining records which are the subject of public records litigation;¹¹
- If public records are provided by remote electronic means, a records custodian must ensure that those records are secure;¹²
- Provide supervision if someone wishes to photograph records;¹³ and
- Provide certified copies of public records upon payment of a fee.¹⁴

Public records custodians are also responsible for supervising the production of records by all agency personnel. Section 119.07(1)(a), F.S., provides that that “[e]very person who has custody of a public record shall permit the record to be inspected and copied ... at any reasonable time, under reasonable conditions, and under reasonable supervision by the custodian of the public records.”

⁵ Section 119.01(1), F.S.

⁶ Section 119.011(12), F.S., defines “public record” to mean “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.”

⁷ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁸ Section 119.021, F.S.

⁹ Section 119.07(1)(c), F.S.

¹⁰ Section 119.07(1)(d)-(f), F.S.

¹¹ Section 119.07(1)(g)-(i), F.S.

¹² Section 119.07(2), F.S.

¹³ Section 119.07(3), F.S.

¹⁴ Section 119.07(4), F.S.

An agency may not place any conditions upon responding to a public records request other than what is specifically laid out in the law. For example, an agency may not require a person seeking a public record reveal his or her background.¹⁵ Nor may an agency require an individual to put his or her request in writing as a condition of production.¹⁶ In addition, a request must be honored whether it is made by phone, in writing, or in person.¹⁷

Enforcing Public Records Laws and Attorney Fees

Section 119.11, F.S., provides that a court may award a plaintiff attorney fees if a plaintiff files a civil suit to enforce the provisions of ch. 119, F.S., and the court determines that the agency refused to permit inspection or copying of a public record.

Whenever an action is filed to enforce the provisions of ch. 119, F.S., the court must set an immediate hearing, giving the case priority over other pending cases.¹⁸ If the court finds that the agency unlawfully refused access to a public record, the court will order the public agency to pay the plaintiff's costs and attorney fees.¹⁹ A delay in turning over public records is considered an unlawful refusal, and a court will award attorney fees even if the delay was not willful or was due to incompetence.²⁰

Enforcement lawsuits are composed of two parts: the request for production of a record and the assessment of fees. The assessment of attorney fees is a legal consequence independent of the public records request.²¹ Once an enforcement action has been filed, a court will require a public agency to pay the plaintiff's attorney fees even after the agency has produced the records.²²

The public policy behind awarding attorney fees is to encourage people to pursue their right to access government records after an initial denial.²³ In addition, granting attorney fees also makes it more likely that public agencies will comply with public records laws and deters improper denials of requests.²⁴

Personal Liability for Violating the Public Records Act

Violation of the Public Records Act may result in civil and criminal liability pursuant to s. 119.10, F.S. A public officer who violates any provision of the Public Records Act commits a

¹⁵ *Bevan v. Wanichka*, 505 So. 2d 1116, 1118 (Fla. 2d DCA Fla. 1987).

¹⁶ *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302 n.1 (Fla. 3d DCA 2001). Op. Att'y Gen. Informal Opinion dated December 16, 2003.

¹⁷ Op. Att'y Gen. Fla. 80-57 (1980).

¹⁸ Section 119.11(1), F.S.

¹⁹ Section 119.12, F.S.

²⁰ *Lilker v. Suwannee Valley Transit Authority*, 133 So. 3d 654 (Fla. 1st DCA 2014). *Barfield v. Town of Eatonville*, 675 So. 2d 223, 225 (Fla. 5th DCA 1996).

²¹ *Mazer v. Orange County*, 811 So. 2d 857, 859 (Fla. 5th DCA 2002). *Lilker v. Suwannee Valley Transit Authority*, 133 So. 3d 654 (Fla. 1st DCA 2014).

²² *Mazer v. Orange County*, 811 So. 2d 857, 860 (Fla. 5th DCA 2002). *Barfield v. Town of Eatonville*, 675 So. 2d 223, 224 (Fla. 5th DCA 1996). *Althouse v. Palm Beach County Sheriff's Office*, 92 So. 3d 899, 902 (Fla. 4th DCA 2012). Attorney fee provisions for violation of open meetings laws can be found in s. 286.011(4), F.S.

²³ *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27, 29 (Fla. 1993).

²⁴ *Id.*

civil infraction and may be fined up to \$500.²⁵ A public officer who violates a provision of s. 119.071(1), F.S., which addresses the rights of the public to inspect and copy public records, is may be suspended, removed from office or impeached. In addition a public officer who violates s. 119.07(1), F.S., commits a first degree misdemeanor.

The punishment for a first degree misdemeanor includes imprisonment for up to one year²⁶ and a \$1000 fine.²⁷ A court may sentence an individual to pay a fine in addition to or in lieu of imprisonment.²⁸

Section 119.10, F.S., also provides that any person, not just public officers, can be held liable for violating the Public Records Act. Section 119.10(2), F.S. states that any person who willfully and knowingly violates any provision of the Public Records Act commits a first degree misdemeanor. In addition, any person who willfully and knowingly violates s. 119.105, F.S., commits a third degree felony. Section 119.105, F.S., provides confidential or exempt information contained in police reports may not be used for commercial solicitation of victims or their relatives of crimes or accidents.

A third degree felony is punishable by imprisonment for up to five years²⁹ or a fine of up to \$5000.³⁰ A court may sentence an individual to pay the fine in addition to or in lieu of imprisonment.³¹

Limitations of Liability of Governmental Employees

Governmental employees cannot be held personally liable for tort action, or named as defendants “in any action for any injury or damage suffered as a result of any act, event or omission of action in the scope of her or his employment or function” unless the employee acted in bad faith, malicious purpose or with wanton and willful disregard of human rights, safety or property, pursuant to s. 768.28(9)(a), F.S. Instead, a plaintiff must sue the employing governmental entity.³²

III. Effect of Proposed Changes:

The bill allows a court to hold the public records custodian, including the elected or appointed officer heading the agency, personally liable for the reasonable costs of enforcement, including reasonable attorney fees. Attorney fees may be awarded if the following conditions are met:

- The agency or the custodian unlawfully refused to permit a public record to be inspected or copied; and
- The agency or the custodian knowingly asserted a claim or defense which the agency or the custodian knew was not supported by material facts.

²⁵ Section 119.10(1)(a), F.S.

²⁶ Section 775.082(4)(a), F.S.

²⁷ Section 775.083(1)(d), F.S.

²⁸ Section 775.083(1), F.S.

²⁹ Section 775.082(3)(e), F.S.

³⁰ Section 775.083(1)(c), F.S.

³¹ Section 775.083(1), F.S.

³² Section 768.28(9)(a), F.S.

The bill will take effect July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of a state tax shares with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Unknown.

C. Government Sector Impact:

Unknown.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Usually, an employing agency will defend the agency (and therefore the employee or officer) in a public records case and the associated attorney fee lawsuit. This bill may create a situation where the interest of the agency and the interests of the public records custodian may conflict, and independent attorneys may be required. If independent attorneys are required, it is not clear who will pay those costs.

VIII. Statutes Affected:

This bill substantially amends section 119.12 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
