

**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.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 162

INTRODUCER: Senator Perry

SUBJECT: Public Records

DATE: November 4, 2019

REVISED: \_\_\_\_\_

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Hackett</u>	<u>McVaney</u>	<u>GO</u>	<b>Favorable</b>
2. <u>Elsesser</u>	<u>Cibula</u>	<u>JU</u>	<b>Pre-meeting</b>
3. _____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 162 requires that, if an agency seeks declaratory relief that certain public records are exempt from inspection and copying (or are confidential and exempt from inspection and copying), and the court determines that the records are not exempt or not confidential and exempt, the court must assess the reasonable costs of enforcement, including attorney's fees, against the agency that sought the declaratory relief and in favor of the named respondent to the action.

**II. Present Situation:**

Every person has the right, under the Florida Constitution, to "inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf," except exempt or confidential records.<sup>1</sup>

Generally, "all state, county, and municipal records are open for personal inspection and copying by any person."<sup>2</sup> "Public records" are "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."<sup>3</sup>

An agency is "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 ... 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

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<sup>1</sup> Fla. Const. art I, s. 24.

<sup>2</sup> Section 119.01(1), F.S.

<sup>3</sup> Section 119.011(12), F.S.

entity acting on behalf of any public agency.”<sup>4</sup> “Providing access to public records is a duty of each agency.”<sup>5</sup>

Custodians of public records are required to allow inspection and copying of public records “at any reasonable time, under reasonable conditions, and under” the custodian’s supervision.<sup>6</sup> The custodian must acknowledge all requests to inspect or copy records and respond to those requests in good faith.<sup>7</sup> A good faith response includes making reasonable efforts to determine whether the requested records exist and the records’ location.<sup>8</sup> If the custodian contends that the requested records are exempt from inspection and copying, the custodian must state the basis for the exemption, including a citation to the statute creating the exemption, and provide the explanation in writing if requested by the person seeking to inspect or copy the records.<sup>9</sup>

Section 16.60., F.S., creates a public records mediation program, requiring the Office of the Attorney General to employ one or more mediators to mediate disputes involving access to public records. This mediation is voluntary and nonadversarial, and is aimed at assisting parties in “exploring settlement alternatives,” although “decisionmaking authority rests with the parties.”<sup>10</sup> “Section 16.60, F.S., says nothing about when mediation is appropriate or required. It appears to concern disputes that have not reached the stage of a court action.”<sup>11</sup>

An agency seeking guidance on the exempt or confidential status of requested records may seek an Attorney General Opinion on the issue. The Attorney General has a compulsory duty to give opinions if requested by the Governor, a member of the Cabinet, the head of a department in the executive branch of state government, the Speaker of the House of Representatives, the President of the Senate, the Minority Leader of the House of Representatives, or the Minority Leader of the Senate.<sup>12</sup> The Attorney General has the discretionary authority to give opinions if requested by a member of the Legislature, other state officer, or officer of a county, municipality, other unit of local government, or political subdivision.<sup>13</sup>

An agency seeking guidance on the exempt or confidential status of requested records may also file a declaratory action seeking a declaration that the records in question are not public records subject to inspection and copying. A court’s decision in a declaratory action “has the force and effect of a final judgment.”<sup>14</sup>

If an agency denies a records request, the person making the request may file a complaint with a state attorney or file a civil action alleging that the agency’s failure to allow inspection or copying of the requested records is a violation of public records law. When such an action is

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<sup>4</sup> Section 119.011(2), F.S.

<sup>5</sup> Section 119.01(1), F.S.

<sup>6</sup> Section 119.07(1)(a), F.S.

<sup>7</sup> Section 119.07(1)(c), F.S.

<sup>8</sup> *Id.*

<sup>9</sup> Section 119.07(1)(e)-(f), F.S.

<sup>10</sup> Section 16.60(1), F.S.

<sup>11</sup> *Arezaga v. Board of Cty. Com’rs of Hillsborough Cty.*, 935 So. 2d 640, 642 (Fla. 2d DCA 2006).

<sup>12</sup> Section 16.01(3), F.S.

<sup>13</sup> *Id.*

<sup>14</sup> Section 86.011, F.S.

filed, the court is required to set an “immediate hearing.”<sup>15</sup> If such a civil action against an agency is required to enforce the public records law, and the requestor gave 5 days’ notice before filing the civil action, the court is required to award the costs of enforcement, including reasonable attorney’s fees, against the agency, if the court finds that the agency “unlawfully refused” to release the records.<sup>16</sup> Refusals needn’t be in bad faith to be “unlawful,” and the prevailing party is entitled attorney’s fees in any civil action against an agency “when the trial court finds that the public agency violated a provision of the Public Records Act in failing to permit a public record to be inspected or copied.”<sup>17</sup>

A willful and knowing violation of the public records laws subjects public officers to fines, suspension, removal, impeachment, or for certain violations, criminal liability.<sup>18</sup>

### **III. Effect of Proposed Changes:**

This bill amends s. 119.07, F.S., requiring a court to impose the costs of enforcement, including reasonable attorney fees, upon an agency if that agency files a declaratory action seeking a declaration that certain records are exempt or confidential and exempt and the court determines that the requested records are not exempt or not confidential and exempt. The bill essentially grants to respondents to agency declaratory actions the same right to attorney fees and costs as are currently afforded by s. 119.12, F.S. This statute grants attorney fees and costs to those who prevail in a civil action against an agency to enforce the public records law.

The bill takes effect July 1, 2020.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

Not applicable. The bill does not require counties and municipalities to spend funds, reduce counties’ or municipalities’ ability to raise revenue, or reduce the percentage of state tax shares with counties and municipalities.

#### **B. Public Records/Open Meetings Issues:**

None.

#### **C. Trust Funds Restrictions:**

None.

#### **D. State Tax or Fee Increases:**

None.

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<sup>15</sup> Section 119.11, F.S.

<sup>16</sup> Section 119.12, F.S.

<sup>17</sup> *Bd. of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120, 128 (Fla. 2016).

<sup>18</sup> Section 119.10, F.S.

E. Other Constitutional Issues:

None identified.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill would decrease costs and fees for prevailing respondents to declaratory actions filed by agencies seeking declarations that requested public records are exempt from disclosure.

C. Government Sector Impact:

An analysis from the Department of Legal Affairs has been requested, though none yet completed. The bill would increase costs and fees for nonprevailing agencies filing declaratory actions seeking declarations that requested public records are exempt from disclosure.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 119.07.

**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.