

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 163 Public Records/Contractors  
**SPONSOR(S):** Government Operations Subcommittee; Beshears and others  
**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 224

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	12 Y, 0 N, As CS	Harrington	Williamson
2) Government Operations Appropriations Subcommittee			
3) State Affairs Committee			

### SUMMARY ANALYSIS

The State Constitution and Florida Statutes govern access to records of state and local agencies. Current law in part defines terms, provides for assessment of certain fees associated with responding to public record requests, requires certain contracts with public agencies to contain provisions regarding public records, and provides for the assessment of attorney fees for an agency found in violation of the public records law. Private contractors who act on behalf of a public agency are required to comply with public records laws in the same manner as a public agency.

This bill requires a public agency contract for services to include a statement in large, boldface font informing the contractor of the name and phone number of the public agency's records custodian and to contact the records custodian concerning any questions the contractor may have regarding the contractor's duties to provide public records relating to the contract. The contract also must state that the requirements of s. 119.0701, F.S., apply to the contract unless the agency has determined otherwise.

The bill repeals the requirement that the contract for services require the contractor to transfer its public records to the public agency upon termination of the contract. Instead, the contract must address whether the contractor will retain the public records or transfer the public records to the public agency upon termination of the contract.

The bill requires the public to make all public record requests regarding contracts for services directly to the agency rather than to the contractor. If the public agency does not have the requested records, the agency must immediately notify the contractor of the request, and the contractor must produce the records within a reasonable time. A contractor who fails to produce the requested records within a reasonable time may be subject to criminal penalties.

The bill also provides that costs and attorney fees will not be assessed in a public records enforcement lawsuit relating to a public agency's contract for services unless the plaintiff sends a certified letter to the responsible public agency's records custodian, and the contractor if the contractor is a named party, at least three business days in advance of filing suit.

The bill may have an indeterminate fiscal impact on state and local governments. See Fiscal Comments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The State Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.01, F.S., provides that it is the policy of the state that all state, county, and municipal records are open for personal inspection and copying by any person, and that it is the responsibility of each agency<sup>1</sup> to provide access to public records.<sup>2</sup> Section 119.07(1), F.S., guarantees every person a right to inspect and copy any public record unless an exemption applies. The state's public records laws are construed liberally in favor of granting public access to public records.

##### Public Records and Private Contractors

##### *Section 119.0701, F.S., Contracts and Public Records*

Public agencies, which include local and statewide governmental entities, as well as municipal officers, are permitted to hire contractors to provide services or act on behalf of the public agency.<sup>3</sup> Contractors can be individuals or business entities.<sup>4</sup> Private contractors who act on behalf of a public agency are required by the law and the terms of their contracts to comply with public records laws in the same manner as a public agency.<sup>5</sup>

Current law does not provide a definition for "acting on behalf of a public agency." In making the determination in whether a private entity is acting on behalf of a public agency, the courts have relied on a "totality of factors" analysis.<sup>6</sup> The factors include, but are not limited to, the level of public funding, whether the services contracted for are an integral part of the public agency's decision-making process, whether the private entity is performing a governmental function or a function which the public agency otherwise would perform, and the extent of the public agency's involvement with, regulation of, or control over the private entity.<sup>7</sup>

Section 119.0701, F.S., requires each public agency contract for services to include certain provisions that require the contractor to comply with public records laws. Specifically, the contract must require the contractor to:

- Keep public records that would be required by the agency to perform the service;
- Provide the public access to public records on the same terms as the agency would;
- Ensure that public records that are exempt or confidential and exempt are not improperly disclosed; and

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<sup>1</sup> Section 119.011(2), F.S., defines the term "agency" to mean 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, for the purposes of chapter 119, F.S., 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 entity acting on behalf of any public agency.

<sup>2</sup> Section 119.011(12), F.S., defines the term "public records" to mean all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of 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> Section 119.0701(1), F.S.; *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla. 1992); Op. Att'y Gen. Fla. Informal Opinion dated December 31, 2014.

<sup>4</sup> Section 119.0701(1)(a), F.S.

<sup>5</sup> Section 119.0701, F.S.; *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla. 1992).

<sup>6</sup> See, e.g., *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla. 1992).

<sup>7</sup> *Id.*

- Meet certain public records retention and transfer requirements.

Upon the completion of a contract, the contract for services must provide for the transfer of public records from the contractor to the public agency at no cost to the public agency.<sup>8</sup> The contractor is not permitted to retain any public records that are confidential and exempt or exempt from public records disclosure.<sup>9</sup> Records that are stored electronically must be transferred to the public agency in a format that is compatible with the public agency's information technology systems.<sup>10</sup>

A public agency is required to enforce the terms of its contract if a contractor fails to abide by public records laws.<sup>11</sup>

#### *Section 287.058, F.S., Contract Document*

For state agencies,<sup>12</sup> every procurement of contractual services in excess of \$35,000, except for specified procurements pertaining to health and human services, must be evidenced by a written agreement (contract) embodying all provisions and conditions of such services.<sup>13</sup> The contract must be signed by the agency head or designee and the contractor before the rendering of any contractual service, except in the case of an emergency.<sup>14</sup>

Section 287.058(1), F.S., provides provisions that must be included in the contract document. With regards to public record requirements, the contract document must allow for unilateral cancellation by the state agency for refusal by the contractor to allow public access to all documents, papers, letters, or other material made or received by the contractor in conjunction with the contract, unless the records are exempt from public record requirements.<sup>15</sup>

#### Inspection and Copying of Public Records

Current law describes the duties and responsibilities of a custodian of public records (records custodian). Section 119.07(1), F.S., requires a records custodian to permit records to be inspected and copied by any person, at any reasonable time,<sup>16</sup> under reasonable conditions, and under supervision by the records custodian. Generally, a records custodian may not require that a request for public records be submitted in a specific fashion.<sup>17</sup>

An agency is permitted to charge fees for inspection or copying of records. Those fees are prescribed by law and are based upon the nature or volume of the public records requested. Section 119.07(4), F.S., provides if the nature or volume of the request requires extensive use of information technology or extensive clerical or supervisory assistance, the agency may charge, in addition to the actual cost of duplication, a reasonable service charge based on the cost incurred for the use of information technology and the labor cost that is actually incurred by the agency in responding to the request.<sup>18</sup> The term "labor cost" includes the entire labor cost, including benefits in addition to wages or salary.<sup>19</sup> Such

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<sup>8</sup> Section 119.0701(2)(d), F.S.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Section 119.0701(3), F.S.

<sup>12</sup> For purposes of chapter 287, F.S., agency does not include the university and college boards of trustees or the state universities and colleges.

<sup>13</sup> Section 287.058(1), F.S.

<sup>14</sup> Section 287.058(2), F.S.

<sup>15</sup> Section 287.058(1)(c), F.S.

<sup>16</sup> There is no specific limit established for compliance with public records requests. A response must be prepared within a reasonable time of the request. *Tribune Co. v. Cannella*, 458 So.2d 1075 (Fla. 1984). What constitutes a reasonable time for a response will depend on such factors as the volume of records that are responsive to a request, as well as the amount of confidential or exempt information contained within the request.

<sup>17</sup> *See Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So.2d 302 (Fla. 3d DCA 2001) (holding that public records requests need not be made in writing).

<sup>18</sup> Section 119.07(4)(d), F.S.

<sup>19</sup> *Board of County Commissioners of Highlands County v. Colby*, 976 So.2d 31 (Fla. 2d DCA 2008).

service charge may be assessed, and payment may be required, by an agency prior to providing a response to the request.<sup>20</sup>

### Enforcing Public Records Laws and Attorney Fees

If a public agency unlawfully fails to provide a public record, the person making the public records request may sue to have the request enforced.<sup>21</sup> Whenever such an action is filed, the court must give the case priority over other pending cases and must set an immediate hearing date.<sup>22</sup>

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 considered a legal consequence that is independent of the public records request.<sup>23</sup> Once an enforcement action has been filed, a public agency, or a contractor acting on behalf of a public agency, can be held liable for attorney fees even after the public agency has produced the requested records.<sup>24</sup> The public policy behind awarding attorney fees is to encourage people to pursue their right to access government records after an initial denial.<sup>25</sup> Granting attorney fees also makes it more likely that public agencies will comply with public records laws and deter improper denials of requests.<sup>26</sup>

If the court finds that the agency unlawfully refused access to a public record, the court will order the public agency to pay for the requestor's reasonable costs of enforcement, including reasonable attorney fees.<sup>27</sup> If a contractor acting on behalf of the agency fails to comply with a public records request, the requestor may sue the contractor to enforce his or her rights to have access to records.<sup>28</sup> If a court determines that the contractor unlawfully withheld public records, the court must order the contractor to pay for the cost of the enforcement lawsuit and the requestor's attorney fees in the same manner that a public agency would be liable.<sup>29</sup> Attorney fees for efforts expended to obtain attorney fees are not currently permitted.<sup>30</sup>

A court will not take into consideration whether a records custodian intended to violate public records laws or was simply inept,<sup>31</sup> and it is immaterial if a records custodian did not willfully refuse to provide a public record.<sup>32</sup> In addition, to be entitled to attorney fees against the state or any of its agencies, the plaintiff must serve a copy of the pleading claiming the fees on the Department of Financial Services (DFS). DFS is then entitled to participate with the agency in the defense of the suit and any appeal thereof with respect to such fees.<sup>33</sup>

### Recent Litigation

On December 1, 2014, a circuit court judge in Duval County denied relief to a plaintiff in a lawsuit to enforce a public records request and for assessment of attorney fees.<sup>34</sup> According to the court order, the plaintiff made two separate requests for public records to a nonprofit organization under contract to provide social services for the Department of Children and Families. The contract manager refused to provide the documents because the contract manager believed the documents were not public records.

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<sup>20</sup> Section 119.07(4), F.S.; *see also* *Wootton v. Cook*, 590 So.2d 1039, 1040 (Fla. 1st DCA 1991) (stating if a requestor identifies a record with sufficient specificity to permit [an agency] to identify it and forwards the appropriate fee, [the agency] must furnish by mail a copy of the record).

<sup>21</sup> Section 119.11, F.S.

<sup>22</sup> *Id.*

<sup>23</sup> Section 119.12, F.S.

<sup>24</sup> *Mazer v. Orange County*, 811 So.2d 857, 860 (Fla. 5th DCA 2002); *Barfield v. Town of Eatonville*, 675 So.2d 223 (Fla. 5th DCA 1996); *Althouse v. Palm Beach County Sheriff's Office*, 92 So.3d 899, 902 (Fla. 4th DCA 2012).

<sup>25</sup> *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So.2d 27, 29 (Fla. 1993).

<sup>26</sup> *Id.*

<sup>27</sup> Section 119.12, F.S.

<sup>28</sup> Section 119.0701(2), F.S.; *see also* *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So.2d 27 (Fla. 1993).

<sup>29</sup> *See* s. 119.12, F.S.; *see also* *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So.2d 27, 29 (Fla. 1993).

<sup>30</sup> *Downs v. Austin*, 559 So.2d 246, 248 (Fla. 1st DCA 1990).

<sup>31</sup> *Barfield v. Town of Eatonville*, 675 So.2d 223, 225 (Fla. 5th DCA 1996).

<sup>32</sup> *Lilker v. Suwannee Valley Transit Authority*, 133 So.3d 654 (Fla. 1st DCA 2014).

<sup>33</sup> Section 284.30, F.S.

<sup>34</sup> *Jeffery Marcus Gray v. Lutheran Social Services of Northeast Florida, Inc.*, Final Order Denying Relief Under Public Records Act, No. 2014-CA-4647 (Fla. 4th Cir. Ct. Dec. 2, 2014).

The court found that the manner in which the plaintiff (and his companions) made the request ensured that “they obtained exactly what they wanted, namely an initial denial of an unreasonable and bogus request.”<sup>35</sup>

The court found that the plaintiff’s method of requesting public records was an abuse of the public records laws noting that the actions of the requester amounted to “nothing more than a scam.”<sup>36</sup> The Final Order stated that the plaintiff and his attorney, who had an arrangement to split his attorney fees with the plaintiff, had “a financial interest in assuring that his requests for public records [were] refused.”<sup>37</sup> The court noted that in 2014, the plaintiff filed 18 public records lawsuits in Duval County, and that the attorney represented the plaintiff on approximately 13 of those cases; the court noted that all of the cases followed a similar pattern.

The court opined that:

If a private entity must pay an attorney’s fee every time an agent denies a needless request, the cost to the state to provide important services by contracting with private entities will increase; or private entities might discontinue bidding on these contracts. The chilling effect could be disastrous to the State. Further the [Public Records] Act was not designed to create a cottage industry for so-called “civil rights activists” or others who seek to abuse the [Public Records] Act for financial gain.<sup>38</sup>

The case is currently on appeal.<sup>39</sup>

### **Effect of Proposed Changes**

The bill amends s. 119.0701, F.S., relating to contracts and public records.

The bill requires a contract for services to include a statement in large, boldface font informing the contractor:

- That the requirements of s. 119.0701, F.S., apply to the contract unless the public agency has determined that the contractor is not a contractor;
- Of the name and phone number of the public agency’s records custodian; and
- To contact the records custodian concerning any questions the contractor may have regarding the contractor’s duties to provide public records relating to the contract.

Essentially, an agency must make a legal determination about whether a contractor is acting on behalf of the agency for purposes of the public records laws. If the public agency determines that the contractor is not acting on its behalf, the public agency must make an express determination in the contract that the contractor “is not a contractor.”

The bill repeals the requirement that the contract for services require the contractor to transfer its public records to the public agency upon termination of the contract. Instead, the contract must address whether the contractor will retain the public records or transfer the public records to the public agency upon termination of the contract. If requested by the public agency, all records stored electronically must be provided to the public agency in a format that is compatible with the information technology systems of the public agency.

The bill requires a public records request concerning contracted services to be made to the agency’s records custodian. If the request concerns records held by the contractor, the bill requires the agency to immediately notify the contractor. Upon such notification, the contractor must produce the records

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> A Notice of Appeal was filed with the First District Court of Appeal on December 19, 2014, in *Jeff Gray vs. Lutheran Services of Social Services of Northeast, Inc.*, Case Number 1D14-5793. Appellant’s initial brief must be filed on or before March 21, 2015.

within a reasonable time. As a result, a member of the public may not make a public records request directly to the contractor. A contractor who fails to produce the records within a reasonable time is subject to the penalties under s. 119.10, F.S. Section 119.10, F.S., provides that a violator may be fined up to \$500.00, subject to impeachment, or held criminally liable.<sup>40</sup>

If a civil action is filed to compel production of public records relating to a public agency's contract for services against a public agency or a contractor that continues to possess such records, the bill provides that a court may only assess and award the reasonable costs of enforcement, including reasonable attorney fees if the plaintiff provided written notice of the public records request by certified mail to the public agency's records custodian at least three business days before filing suit informing the public agency that the contractor has not complied with the public records request. The contractor also must be noticed if the contractor is a named party in the action. The letter must state that the contractor has not complied with a public records request.

**B. SECTION DIRECTORY:**

Section 1. amends s. 119.0701, F.S., relating to contracts and public records.

Section 2. provides an effective date of upon becoming a law.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill will require an individual to provide notice of his or her intent to sue prior to filing suit if the individual wishes to recover attorney fees in certain public records enforcement actions. As such, the bill may have an indeterminate fiscal impact on the private sector related to litigation costs.

In addition, it is unclear what costs might be associated with a contractor maintaining public records upon termination of the contract in lieu of transferring the public records to the records custodian.

**D. FISCAL COMMENTS:**

The bill amends contract clause provisions relating to public records. As a result, state and local government contracts will have to be revised to include the new language. The changes may increase legal and administrative costs associated with revising the contract documents.

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<sup>40</sup> Section 119.10(2)(a), F.S., makes a violation of the public records laws a misdemeanor.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

The county/municipal mandates provision of Art. VII, s. 18, of the State Constitution may apply because this bill requires public agencies to amend contract documents for services to include new language concerning the applicability of the public records laws; however, an exemption may apply because the fiscal impact will likely be insignificant.

##### 2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

##### Other Comments: "Acting on behalf of a public agency"

The bill requires the public agency to make a legal determination concerning whether a contractor is acting on behalf of the agency. The bill does not address what would occur if the agency declares the contractor is not acting on its behalf for purposes of public records laws and the contractor relies on that determination, but a court later determines the contractor was in fact acting on behalf of the agency. On the other hand, the inclusion of the form language may encourage an agency to declare that the contractor is acting on its behalf, even when the contractor is not legally acting on behalf of the agency.

##### Other Comments: Retention of Public Records

Current law requires a contract to contain a provision providing for the transfer, at no cost, to the public agency all public records in possession of the contractor upon termination of the contract. The bill revises this contract provision to require the contractor to keep and maintain the public records upon completion of the contract. Under the revised provisions in the bill, the contractor only transfers the public records to the records custodian upon request.

It is unclear what will happen to the public records if the contractor is permitted to retain the public records upon termination of the contract. If the contract provides that the contractor will keep and maintain the public records upon its termination, then the contractor may be required to comply with laws related to retention and disposal of public records.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 4, 2015, the Government Operations Subcommittee adopted one strike-all amendment and reported the bill favorable with a committee substitute. The committee substitute:

- Removes the definition for "acting on behalf of an agency" and maintains current law regarding the definition of "contractor;"
- Amends the form language that is required to be included in a contract with a contractor to require the agency to identify in the contract if the contractor is acting on behalf of the agency;
- Requires all public requests concerning the contract be sent to the agency, rather than the contractor. The agency must immediately notify the contractor of the request;
- Removes the requirement that a court find the contractor willfully violated the public records laws prior to awarding attorney fees; and
- Shortens the pre-suit notification period from 5 days to 3 days.

This analysis is drafted to the committee substitute as approved by the Government Operations Subcommittee.