

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 Fiscal Policy

BILL: CS/CS/SB 224

INTRODUCER: Judiciary Committee; Governmental Oversight and Accountability Committee; and Senator Simpson and others

SUBJECT: Public Records/Public Agency Contracts

DATE: March 25, 2015

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|--------------|-----------------|-----------|--------------------|
| 1. | <u>Kim</u> | <u>McVaney</u> | <u>GO</u> | <u>Fav/CS</u> |
| 2. | <u>Brown</u> | <u>Cibula</u> | <u>JU</u> | <u>Fav/CS</u> |
| 3. | <u>Pace</u> | <u>Hrdlicka</u> | <u>FP</u> | <u>Pre-Meeting</u> |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 224 amends s. 119.0701, F.S., to revise procedures for obtaining records relating to a public agency's contract for services with a private contractor. Specifically, the bill requires:

- All public records requests regarding contracts for services must be made directly to the agency rather than to the contractor;
- Each public agency contract for services must include the contact information of the agency's public records custodian and a specific provision requiring the contractor to comply with public records laws; and
- The party requesting the public records must send written notice to the agency to be awarded costs and fees in a public records enforcement lawsuit.

The fiscal impact of the bill is indeterminate.

II. Present Situation:

Public Records and Open Meetings Requirements

The Florida Constitution provides every person the right 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 of persons acting on their behalf.¹ This includes the records of the legislative, executive, and judicial branches.² The Florida Constitution also requires all meetings of any collegial public body of the executive branch of state government or of any local government, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, to be open and noticed to the public.³ Florida law specifies conditions under which public access must be provided to government records and meetings. The Public Records Act⁴ guarantees every person's right to inspect and copy any state or local government public record⁵ at any reasonable time, under reasonable conditions, and under the supervision of the public records custodian.⁶ The Sunshine Law⁷ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken to be noticed and open to the public.⁸

Enforcing Public Records Laws and Attorney Fees

Article I, Section 24(c), Florida Constitution, authorizes the Legislature to enact laws governing the enforcement of public records requirements, including the “maintenance, control, destruction, disposal, and disposition of records made public by this section ...”

Section 119.11, F.S., provides that if a public agency fails to provide a public record, the person making the public records request may sue for enforcement. 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.⁹ 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 costs and attorney fees.¹⁰ A court will not consider as relevant intent by a records custodian to violate public records laws, incompetence,¹¹ or that the records custodian did not willfully refuse to provide a public record.¹²

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

¹ Article I, s. 24(a), FLA. CONST.

² *Id.*

³ Article I, s. 24(b), FLA. CONST.

⁴ Chapter 119, F.S.

⁵ 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.” Section 119.011(2), F.S., defines “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 this chapter, 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.” The Public Records Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)).

⁶ Section 119.07(1), F.S.

⁷ Section 286.011, F.S.

⁸ Section 286.011(1)-(2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in Article III, s. 4(e) of the Florida Constitution.

⁹ Section 119.11(1), F.S.

¹⁰ Section 119.12, F.S.

¹¹ *Barfield v. Town of Eatonville*, 675 So.2d 223, 225 (Fla. 5th DCA 1996).

¹² *Lilker v. Suwannee Valley Transit Authority*, 133 So.3d 654 (Fla. 1st DCA 2014).

public records request.¹³ Once an enforcement action has been filed, a public agency can be assessed attorney fees even after the agency has produced the records.¹⁴

The public policy behind awarding attorney fees is to encourage people to pursue their right to access government records after an initial denial.¹⁵ Granting attorney fees also makes it more likely that public agencies will comply with public records laws and deter improper denials of requests.¹⁶

Public Records and Private Contractors

Public agencies, including local and statewide governmental entities and municipal officers, are permitted to hire contractors to provide services or act on behalf of the public agency.¹⁷ Contractors can be individuals or business entities.¹⁸ Private contractors who act on behalf of a public agency are required by law and the terms of their contracts to comply with public records laws in the same manner as a public agency.¹⁹ These duties include keeping public records, providing the public an opportunity to inspect or copy a public record, and redacting exempt information.²⁰ A public agency is required to enforce the terms of its contract if a contractor fails to abide by public records laws.²¹

Contracts for services must include language that upon completion of the contract, the contractor will transfer all public records to the public agency at no cost. The contractor is not permitted to retain any public records that are confidential and exempt or exempt from public records disclosure. 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.

Although certain contractors are obligated to abide by Florida's public records laws, some contractors fail to do so. At times, contractors unlawfully place conditions on the release of records, refuse to provide public records, or unlawfully delay in providing records.

If a contractor fails to comply with a public records request, the requestor may sue the contractor to enforce his or her rights to have access to the records.²² 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.²³ Therefore, once a lawsuit is filed, a contractor may also be held

¹³ *Id.*

¹⁴ *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).

¹⁵ *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So.2d 27, 29 (Fla. 1993).

¹⁶ *Id.*

¹⁷ Section 119.0701(1)(b), F.S. *News and Sun-Sentinel Co. v. Schwab, Twitty and Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla. 1992). Op. Att'y Gen. Fla. Informal Opinion dated December 31, 2014.

¹⁸ Section 119.0701(1)(a), F.S.

¹⁹ Section 119.0701, F.S. *News and Sun-Sentinel Co. v. Schwab, Twitty and Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla. 1992).

²⁰ Section 119.0701(2), F.S.

²¹ Section 119.0701(3), F.S.

²² *Supra note 15.*

²³ *Supra note 15.*

liable for attorney fees even after providing the requested records. The fees provision, however, “was not intended to force private entities to comply with the inspection requirements of [the Public Records Act] by threatening to award attorney’s fees against them.”²⁴

Recent Attorney General Opinion and Litigation

Attorney General Opinion (AGO)

On June 18, 2014, the Attorney General issued an opinion on whether a contractor who enters into a contract for services with an agency is automatically acting on behalf of the agency and subject to the public records law, or whether application of the public records law is determined by the nature and scope of the services provided by the contractor.²⁵ Section 119.0701(1)(a), F.S., defines a contractor as an “individual, partnership, corporation, or business entity that enters into a contract for services with a public agency and is acting on behalf of the public agency”

The AGO concludes that a court must additionally examine the nature and scope of services provided, citing in support *Parsons & Whittemore*, which held that a contract with a public agency alone is insufficient to trigger public records requirements.²⁶ In *Stanfield v. Salvation Army*, the Salvation Army contracted with the county to provide all of the county’s probation services. Here, the court held that the Salvation Army took the place of the agency in this regard, acted on behalf of the agency, and was therefore subject to the public records law.²⁷

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 to assess attorney fees.²⁸ 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 a document because the contract manager believed that the document was not a public record. 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.”²⁹

The court found that the plaintiff’s method of requesting public records was an abuse of the public records laws and “nothing more than a scam.”³⁰ 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.”³¹ Generally, an attorney may not share his or her fees with someone who is not a lawyer.³² The court noted that

²⁴ *New York Times Co. v. PHH Mental Health Services, Inc.* 616 So.2d 27, 29 (Fla. 1993).

²⁵ AGO 2014-06 (June 18, 2014).

²⁶ *Parsons & Whittemore v. Metropolitan Dade County*, 429 So.2d 343, 346 (Fla. 3d DCA 1983).

²⁷ *Stanfield v. Salvation Army*, 695 So. 2d 501 (Fla. 5th DCA 1997).

²⁸ Final Order Denying Relief Under Public Records Act, *Jeffrey Marcus Gray v. Lutheran Social Services of Northeast Florida, Inc.*, No. 2014-CA-4647 (Fla. 4th Cir. Ct. 2014).

²⁹ *Id.* at 6.

³⁰ *Id.*

³¹ *Id.* at 4.

³² Florida State Bar Rule 4-5.4.

in 2014, the plaintiff had filed 18 public records lawsuits in Duval County, and the same attorney represented the plaintiff in approximately 13 of those cases.

The court further opined:

“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 Act for financial gain.”³³

The case is currently on appeal.³⁴

III. Effect of Proposed Changes:

The bill requires all public records requests relating to a contract for services to be made directly to a public agency. The agency must notify the contractor if the agency does not have the records. The contractor, in turn, must provide the records to the agency or allow inspection and copying within a reasonable time. A contractor who fails to produce the records within a reasonable time is subject to penalties under s. 119.10, F.S. For example, the contractor may be subject to a criminal charge of a first degree misdemeanor for failing to comply with a public records request within a reasonable time.

In addition, the bill requires each public agency contract for services to include the following provisions:

- The contact information of the agency’s public records custodian if the contractor has questions regarding the applicability of the public records law;
- The contractor must either provide the public agency a copy of the requested public records in the possession of the contractor, or allow records to be inspected or copied within a reasonable time;
- Public records that are exempt or confidential and exempt from public records disclosure cannot be disclosed by the contractor for the duration of the contract term and after completion of the contract if the contractor keeps the records; and
- The contractor has the option of transferring all public records to the public agency upon completion of the contract, or keeping and maintaining the records and complying with the public records law and requests.

If a person files a motion to compel the production of records, the court may assess and award reasonable costs, including attorney fees, against the public agency or contractor. To do so, the court must receive from the plaintiff written notice of the public records request, including a statement that the public agency has failed to comply with the request. At least 5 business days before filing the action, the plaintiff must send notice by certified mail to the public agency’s custodian of public records and must be provided to the contractor if the contractor is a defendant.

³³ *Supra note 28, at 7.*

³⁴ A Notice of Appeal was filed with the First District Court of Appeal in Case Number 1D14-5793 (December 19, 2014).

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require counties or municipalities to take an action requiring the significant expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, or reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

This bill substantially amends the public records law by shifting the burden to produce public records to the agency, even when records are not in the agency's possession.

The bill also makes it possible for former private contractors to become public records custodians even when the contractor is no longer acting on behalf of an agency.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The fiscal impact of the bill is indeterminate, but a fiscal impact may result from:

- The requirement that members of the public send certified letters before filing suit if they intend to recover attorney fees in a public records enforcement action; and
- The costs incurred by the former contractor if the contractor retains the public records after termination of a contract.

C. Government Sector Impact:

If the contractor keeps public records upon termination of a contract, an agency may have to rely on the former contractor to provide records upon request. An agency may be liable for attorney fees because the contractor failed to produce records in a timely manner.

VI. Technical Deficiencies:

None.

VII. Related Issues:

If a terminated contractor goes out of business, whether the contractor is required to deliver the public records to the agency is unknown.

VIII. Statutes Affected:

This bill substantially amends section 119.0701 of the Florida Statutes.

IX. Additional Information:

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

CS/CS/SB 224 by Judiciary on March 10, 2015:

The CS:

- Removes authority which appeared to place a duty on the custodian of public records to determine whether a contractor was subject to public records law.
- Clarifies that public records that are exempt or confidential and exempt from public records disclosure cannot be disclosed by the contractor for the duration of the contract term and after completion of the contract if the contractor keeps the records.
- Increases to 5 business days, the number of days required for notice to be provided by certified mail from a plaintiff in a motion to compel production action to the defendants in order to be eligible for costs and attorney fees.

CS/SB 224 by Governmental Oversight and Accountability on February 3, 2015:

The CS differs from the original bill in the following ways:

- The CS removes the definition of contractor and “acting on behalf of a public agency.”
- The CS alters statements and terms which must be placed in each contract.
- The CS shortens the notice requirement from five days to three days.
- Removes a bad faith or willful refusal element from enforcement cases.

- B. **Amendments:**

None.