

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 224

INTRODUCER: Senator Simpson

SUBJECT: Public Records/Public Agency Contracts

DATE: February 2, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Kim	McVaney	GO	Pre-meeting
2.			JU	
3.			FP	

I. Summary:

SB 224 amends s. 119.0701, F.S., which governs public records maintained by private contractors performing services for a public agency.

The bill requires each public agency contract for services to include the contact information of the agency's public records custodian. The bill also repeals a requirement that the contract address the transfer of all public records to the public agency after the termination of the contract. Under the bill, the contract may allow the former contractor to retain the public records or transfer the records to the public agency.

The bill 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 two conditions have been met. First, the plaintiff must send a certified letter to the responsible public agency and the contractor at least business five days in advance of filing suit, notifying the public agency that the contractor has failed to comply with a public records request. Second, the court must find that the contractor acted in bad faith or willfully disregarded public records laws when it failed to comply with the public records request.

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

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

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

In addition to the Florida Constitution, the Florida Statutes specify 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 supervision by the custodian of the public record.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

If a public agency unlawfully fails to provide a public record, the person making the public records request may sue to have the records request enforced.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 take into consideration whether a records custodian intended to violate public records laws or was simply inept,¹¹ and it is immaterial if a records custodian did not willfully refuse to provide a public record.¹² Once an enforcement action has been filed, a public agency can be held liable for attorney fees even after the public agency has produced the requested records.¹³

³ FLA. CONST., art. I, s. 24(b).

⁴ Chapter 119, F.S.

⁵ Section 119.011(12), F.S. (2014), 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. (2014), defines "agency" to mean as "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 Art. III, s. 4(e) of the Florida Constitution. That section requires the rules of procedure of each house to provide that:

- All legislative committee and subcommittee meetings of each house and of joint conference committee meetings must be open and noticed to the public; and
- All prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.

⁹ Section 119.11, 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).

¹³ *Mazer v. Orange County*, 811 So.2d 857, 860 (Fla. 5th DCA 2002). *Barfield v. Town of Eatonville*, 675 So.2d (Fla. 5th DCA 1996).

The public policy behind awarding attorney fees is to encourage people to pursue their right to access government records after an initial denial.¹⁴ Granting attorney fees also makes it more likely that public agencies will comply with public records laws and deter improper denials of requests.¹⁵

Public Records and Private Contractors

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.¹⁶ Contractors can be individuals or business entities.¹⁷ Currently, 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.¹⁸ These duties include keeping public records, providing the public an opportunity to inspect or copy a public record, and redacting exempt information.¹⁹ A public agency is required to enforce the terms of its contract if a contractor fails to abide by public records laws.²⁰

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 public records.²¹ 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.²² 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."²³

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.²⁴ 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

¹⁴ *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So.2d 27, 29 (Fla. 1993).

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

¹⁶ Section 119.0701(1)(a)-(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.

¹⁷ Section 119.0701(1)(a), F.S.

¹⁸ Section 119.0701, F.S. *News and Sun-Sentinel Co. v. Schwab, Twitty and Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla. 1992).

¹⁹ Section 119.0701(1)-(2), F.S.

²⁰ Section 119.0701(3), F.S.

²¹ Section 119.0701(2), F.S. *New York Times Co. v. PHH Mental Health Services, Inc.* 616 So.2d 27 (Fla. 1993).

²² Section 119.12, F.S. *New York Times Co. v. PHH Mental Health Services, Inc.* 616 So.2d 27, 29 (Fla. 1993).

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

²⁴ Final Order Denying Relief Under Public Records Act, *Jeffery Marcus Gray v. Lutheran Social Services of Northeast Florida, Inc.*, No. 2014-CA-4647 (Fla. 4th Cir. Ct. Dec. 2, 2014).

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.”

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.”²⁵ 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 are refused.”²⁶ (Generally, an attorney may not share his or her fees with someone who is not a lawyer.²⁷) The court noted that in 2014, the plaintiff had filed 18 public records lawsuits in Duval County, and that the attorney represented the plaintiff on approximately 13 of those cases.

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 gain²⁸

The case is currently on appeal.²⁹

III. Effect of Proposed Changes:

- This bill limits the definition of a “contractor” to those contractors who perform a governmental function or a function the public agency would otherwise perform. Not every entity that has a contract with a public agency is required to keep public records, and this modification provides some clarification about which types of contractors are required to do so.
- This bill creates a statutory definition of “acting on behalf of a public agency” to mean that the contractor is performing a function that is the public agency’s responsibility.
- This bill requires contracts for services to include a statement in large, bold font informing the contractor the name and phone number of the public agency’s records custodian to address any questions regarding the contractor’s duties to provide public records relating to the contract.
- 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. Under the bill, the contract must address whether the contractor must retain the public records or return the public records upon termination of the contract.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Florida State Bar Rule 4-5.4.

²⁸ Final Order Denying Relief Under Public Records Act, *Jeffery Marcus Gray v. Lutheran Social Services of Northeast Florida, Inc.*, No. 2014-CA-4647 (Fla. 4th Cir. Ct. Dec. 2, 2014).

²⁹ 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, etc.*, Case Number 1D14-5793.

- When a lawsuit is filed against the public agency or the contractor to enforce a public records request relating to the public agency's contract, the court may only award attorney fees to the requestor under the following conditions:
 - The requestor provides written notice by certified letter at least five days in advance of filing suit informing the public agency that the contractor has not complied with the requestor's public records request. The contractor must also be noticed if it is named as named as a defendant; and
 - The court makes factual findings that the contractor acted in bad faith or willfully disregarded public records laws in denying a request.

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 creating an 'intent' element for contractors regarding when costs and attorney fees will be assessed.

In 1984, the Legislature amended the public records attorney fee provision, deleting language which would permit attorney fees to be awarded only when records are "unreasonably" refused and replaced it with "unlawfully" refused.³⁰ Based on the Legislature's removal of the word "unreasonably," a court concluded that good faith or honest mistakes do not excuse a defendant from being assessed attorney fees."³¹

This bill creates a two tier system in which contractors will be assessed costs and attorney fees if the court found that the contractor acted in bad faith or willfully broke public records laws. Public agencies, however, will be assessed costs and fees if a court determines that the agency unlawfully denied access to public records, regardless of whether there was any bad faith or intent to do so.

C. Trust Funds Restrictions:

None.

³⁰ Ch. 84-298, s. 7, Laws of Fla.

³¹ *News and Sun-Sentinel Co. v. Palm Beach County*, 517 So.2d 743, 744 (Fla. 4th DCA 1987), partially disapproved of in *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So.2d 27, 30 (Fla. 1993). *Lilker v. Suwannee Valley Transit Authority*, 133 So.3d 654 (Fla. 1st DCA 2014). *Office of the State Attorney for the Thirteenth Judicial Circuit of Florida v. Gonzalez*, 953 So.2d 759, 765 (Fla. 2nd DCA 2007).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

It is unknown at this time what the fiscal impact on the private sector will be under the bill. The provisions that may have a fiscal impact on the private sector include:

- The requirement that members of the public send certified letters to the public agency and the contractor before filing suit if they intend to recover attorney fees in a public records enforcement action.
- The requirement that the records requester must prove that a contractor acted in bad faith or willfully disregarded public records laws in order to recover attorney fees. Because these are additional elements to prove, litigation costs may increase.
- The costs incurred by the former contractor if the contractor retains the public records after termination of a contract.

C. Government Sector Impact:

Contracts for each contractor responsible for maintaining public records will have to be revised to include new language. These changes may increase legal and administrative costs.

VI. Technical Deficiencies:

The use of the phrase ‘compel production of records’ appears to limit this bill to documents which can be produced (or reproduced) and given to the requestor. Public records requests, however, can be much broader. Public records are maintained and preserved in the building in which they are ordinarily used,³² and the public has a right to photograph or inspect records in person.³³ A records custodian may also permit records to be inspected and copied under reasonable conditions under the supervision.³⁴

The bill is ambiguous as to whether the scope of enforcement actions are limited to the actual contract and documents directly related to the contract or all public records that encompass the business contemplated by the contract.

The phrase “acting on behalf of any public agency” appears in the definition of “agency” in s. 119.011(2), F.S. Chapter 119, as a whole, may read more clearly if the definition of “acting on behalf of a public agency” is placed in the definitions section. Case law has also provided a totality of factors test to determine when a private entity is acting on behalf of a public agency, and it is unclear what impact this new definition, if any, will have on existing precedent.³⁵

³² Section 119.021(1), F.S.

³³ Section 119.07, F.S.

³⁴ Section 119.07(1)(a), F.S.

³⁵ *News and Sun-Sentinel Co. v. Schwab, Twitty and Hanser Architectural Group, Inc.*, 596 So.2d 1029 (Fla. 1992).

VII. Related Issues:

It is unclear what will happen to public records if the contractor is permitted to retain the public records upon termination of a contract. If the contractor becomes a default permanent records custodian for the records after the contract has been terminated, the contractor may be subject to public records laws and laws related to the retention and disposal of public records long after the contract has terminated (and without compensation). It is also unclear what happens to public records if a terminated contractor goes out of business.

VIII. Statutes Affected:

This bill substantially amends section 119.0701 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.