

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/CS/SB 1220

INTRODUCER: Fiscal Policy Committee; Judiciary Committee; Governmental Oversight and Accountability Committee; and Senator Garcia

SUBJECT: Public Records

DATE: February 19, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	<u>Fav/CS</u>
2.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
3.	<u>Jones</u>	<u>Hrdlicka</u>	<u>FP</u>	<u>Fav/CS</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/CS/SB 1220 provides guidance to judges in determining whether to grant or deny enforcement costs, including reasonable attorney fees, in actions requiring agencies to disclose public records. A court must assess and award the reasonable costs of enforcement, including reasonable attorney fees, against the responsible agency if it determines that the:

- Agency unlawfully refused to permit the public record to be inspected or copied; and
- Complainant provided written notice identifying the public record request to the agency's custodian of public records at least 5 days before filing the civil action, except as provided below.

The complainant is not required to provide written notice of the public record request, as required above, if the agency does not prominently post the contact information for the agency's custodian of public records in the agency's primary administrative building in which public records are routinely created, sent, received, maintained, and requested and on the agency's website, if the agency has website.

A court may not assess and award any reasonable costs of enforcement, including reasonable attorney fees, against the agency if the court determines that the request to inspect or copy the public record was made primarily to harass the agency or cause a violation of ch. 119, F.S. The bill has a positive fiscal impact on state government. See Section V. Fiscal Impact Statement.

The bill is effective upon becoming law.

II. Present Situation:

Public Records Requirements

The Florida Constitution provides that every individual has a right of access to public records, unless exempted, which are made or received in connection with official public business. This right applies to records of the legislative, executive, and judicial branches.¹

The Public Records Act, codified in ch. 119, F.S., expressly guarantees every person's right to inspect and copy any state or local government public record² at any reasonable time, under reasonable conditions, and under the supervision of the public records custodian.³ The Public Records Act also applies to a private contractor if that private business acts on behalf of a governmental entity.⁴

An agency, as defined by ch. 119, F.S., may not impose greater conditions on responding to a public records request than that required by law. For example, an agency may not require a person seeking a public record to disclose his or her background information.⁵ Nor may an agency require an individual to put his or her request in writing as a condition of production.⁶ An agency must honor a request whether a person requests records by phone, in writing, or in person, provided that the request is sufficient to identify the records sought.⁷

Custodian of Public Records

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."⁸

A custodian is required to perform statutorily required duties related to maintaining records and handling public records requests, which duties include:⁹

¹ Article I, s. 24(a), FLA. CONST.

² Section 119.011(12), F.S., defines "public record" as "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."

³ Section 119.07(1)(a), F.S.

⁴ Section 119.011(2), F.S., defines "agency" 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. *Locke v. Hawkes*, 595 So.2d 32, 36-37 (Fla. 1992).

⁵ *Bevan v. Wanichka*, 505 So.2d 1116, 1118 (Fla. 2d DCA 1987).

⁶ *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So.2d 302, n.1 (Fla. 3d DCA 2001); Op. Att'y Gen. Informal Opinion (Dec. 16, 2003), available at <http://myfloridalegal.com/ago.nsf/informalprintview/7AA59B4C58D0818085256DFF00627B55> (last visited Feb. 12, 2016).

⁷ Op. Att'y Gen. Fla. 80-57, pg. 3 (1980), available at <http://www.myfloridalegal.com/ago.nsf/printview/29B1FE397E99E1238525658D005C903B> (last visited Feb. 12, 2016).

⁸ Section 119.011(5), F.S.

⁹ See ss. 119.021 and 119.07(1)-(4), F.S.

- Acknowledging a public records request and responding in good faith;
- Producing records after redacting exempt information or providing the statutory citation for an exemption if the entire document is exempt;
- Maintaining records that are the subject of public records litigation;
- Ensuring records are secure if public records are provided by remote electronic means;
- Providing supervision if someone wishes to photograph records; and
- Providing certified copies of public records upon payment of a fee.

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 “[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.”

Enforcing Public Records Laws and Attorney Fees

The Florida Constitution requires the Legislature to enact laws governing the enforcement of public records requirements, including the “maintenance, control, destruction, disposal, and disposition of records.”¹⁰

Florida law provides that a person may enforce the right to a public record by a lawsuit against an agency. In those lawsuits, the court must set an immediate hearing, giving the case priority over other cases. If a court orders an agency to open its records for inspection, the agency must comply within 48 hours.¹¹ If the court finds that the agency unlawfully refused access to a public record, the court will order the public agency to pay costs and attorney fees.¹² An unjustified delay in turning over public records is considered an unlawful refusal, and a court will award attorney fees even if the delay is not willful or is due to incompetence.¹³

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.¹⁴ Once an enforcement action is filed, the court will require a public agency to pay the requestor’s attorney fees even after the agency has produced the records.¹⁵

The public policy behind awarding attorney fees is to encourage people to pursue their right to access government records after an initial denial. In addition, granting attorney fees makes it more likely that public agencies will comply with public records laws.¹⁶

¹⁰ Article I, s. 24(c), FLA. CONST.

¹¹ Section 119.11(1) and (2), F.S.

¹² Section 119.12, F.S.

¹³ *Lilker v. Suwannee Valley Transit Auth.*, 133 So.3d 654, 655-656 (Fla. 1st DCA 2014); *Barfield v. Town of Eatonville*, 675 So.2d 223, 225 (Fla. 5th DCA 1996).

¹⁴ *Mazer v. Orange County*, 811 So.2d 857, 859 (Fla. 5th DCA 2002).

¹⁵ *Mazer*, 811 So.2d at 860; *Barfield*, 675 So.2d at 224; *Althouse v. Palm Beach County Sheriff’s Office*, 92 So.3d 899, 902 (Fla. 4th DCA 2012).

¹⁶ *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So.2d 27, 29 (Fla. 1993).

Public Records and Private Contractors

Public agencies, including local and statewide governmental entities and municipal officers may hire contractors to provide services or act on behalf of the public agency. Contractors can be individuals or business entities. 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.¹⁷

Every public records contract for services must include a provision that requires the contractor to comply with public records law. Specifically, a contractor must:

- Keep and maintain public records typically required by the public agency to perform the service;
- Provide public access to public records on the same terms and conditions that the public agency would provide the record and at the same cost authorized by law;
- Protect from disclosure records that are exempt from disclosure requirements or confidential; and
- Retain records as required by law and transfer at no cost all public records to the public agency upon termination of the contract.¹⁸

A public agency is required to enforce the terms of its contract if a contractor fails to abide by public records laws.¹⁹ Actions may include unilateral cancellation of the contract by a state agency if a contractor refuses to allow public access to materials the contractor receives in conjunction with the contract.²⁰

If a contractor fails to comply with a public records request, the requestor may sue the contractor to enforce the right to have access to the records. If a court determines that the contractor unlawfully withheld public records, the court must order the contractor to pay for the cost of the lawsuit and the requestor's attorney fees in the same manner that a public agency would be liable.²¹ Once a lawsuit is filed, a contractor may also be held liable for attorney fees even after providing the requested records.

¹⁷ Section 119.0701(1), 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 (Dec. 31, 2014), available at <http://www.myfloridalegal.com/ago.nsf/Opinions/4BD600F7EBC22FA885257DC1004950F0> (last visited Feb. 12, 2016).

¹⁸ Section 119.0701(2), F.S. Upon termination of a contract, the contractor must destroy any duplicate public records that are exempt or confidential and exempt from disclosure. All records stored electronically must be provided to the public agency in a format compatible with the information technology systems of the public agency. Section 119.0701(2)(d), F.S.

¹⁹ Section 119.0701(3), F.S.

²⁰ Section 287.058(1)(c), F.S., provides that state agency contracts which exceed \$35,000 must include a provision that permits the state to unilaterally cancel the contract if the contractor refuses to permit access to public records. This does not apply to contracts related to certain state employee benefits.

²¹ Sections 119.0701(2) and 119.12, F.S.; *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So.2d 27, 29 (Fla. 1993).

When is a Private Contractor an Agency for Public Records Purposes?

An Attorney General Opinion (AGO) concludes that a court must 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.²²

In contrast, other courts have applied a totality of factors test, which asks the following questions:²³

- Whether the public agency created the contractor;
- How much public funding was involved;
- How much the public agency regulated the contractor;
- The comingling of decision making processes;
- Whether the contractor was performing a government function; and
- The goals of the contractor.²⁴

A contractor's uncertainty as to whether it is an agency for public records purposes is not necessarily considered an unlawful delay or refusal. A court may consider uncertainty to be reasonable, and not impose attorney fees and costs.²⁵

Public Records Requests, Settlements, and Attorney Fees

Over the past few years, there has been an increase in what appears to be lawsuits filed on facial basis that an agency or contractor failed to provide public records, but may have been attempts to collect attorney fees. Agencies often settle the matters because settlements are less costly than litigation.²⁶

Two Gulf Stream residents allegedly filed 1,700 public records requests with the Town of Gulf Stream over 2 years. When the Town of Gulf Stream did not fulfil the requests, one of the residents then sued the city for failure to meet the requests.²⁷ The Town of Gulf Stream has allegedly spend more than \$1 million fielding public records requests and on legal fees, including a class action racketeering suit it filed against several residents and companies related to the residents' actions.²⁸

²² Op. Att'y Gen. Fla. 2014-06 (June 18, 2014), available at <http://www.myfloridalegal.com/ago.nsf/Opinions/FFA361674B780AE085257CFD00650CCB> (last visited Feb. 12, 2016); *Parsons & Whittemore, Inc. v. Metropolitan Dade County*, 429 So.2d 343, 346 (Fla. 3d DCA 1983).

²³ *News and Sun-Sentinel Co.*, 596 So.2d at 1031.

²⁴ *Id.* at 1032.

²⁵ *New York Times Co.*, 616 So.2d at 29; *Stanfield v. Salvation Army*, 695 So.2d 501, 502 (Fla. 5th DCA 1997).

²⁶ For example, the City of Dunedin settled a matter for \$2,500 rather than spending \$10,000 to fight the public records request lawsuit. Mike Brassfield, Tampa Bay Times, *Lawsuits from Public Records Group are a Nuisance, Florida Cities Say*, July 6, 2015, available at <http://www.tampabay.com/news/humaninterest/lawsuits-from-public-records-group-are-a-nuisance-florida-cities-say/2236362> (last visited Feb. 12, 2016).

²⁷ John Kennedy and Joan Musgrave, Palm Beach Post, *Florida Bill Targets Type of Suit Used by Gulf Stream Resident O'Boyle*, updated Oct. 5, 2015, available at <http://www.mypalmbeachpost.com/news/news/state-regional-govt-politics/florida-bill-targets-type-of-suit-used-by-gulf-str/nns5L/> (last visited Feb. 12, 2016).

²⁸ *Supra* note 26.

The Town of Gulf Stream filed the federal lawsuit against a resident, the Citizen's Awareness Foundation, Inc., Our Public Records, LLC, a law firm, and other defendants based on their use of public records laws. The case was dismissed by the federal judge, who stated:

To the extent Defendants are abusing the rights affording them by the Florida public records laws, those abuses must be addressed in the individual lawsuits filed, or through a change in the laws by the Florida Legislature.²⁹

Citizen's Awareness Foundation, Our Public Records, LLC, and a law firm have filed more than 100 lawsuits across 27 counties.³⁰ The lawsuits are filed against government contractors as well as government entities. In one case, the records request was emailed over a weekend, and when the businesses failed to comply, the requestors filed a lawsuit and demanded a settlement in excess of costs and fees. The groups implemented a quota of generating 25 new lawsuits per week.

In another example, a circuit court in Duval County denied a plaintiff relief in a lawsuit to enforce a public records request and assess attorney fees.³¹ According to the court order, the plaintiff did not provide advance notice or written notice of any kind prior to the request and secretly documented the requests and denials on video, later admitting to having done so to present as evidence in a subsequent lawsuit. The court found that the manner in which the plaintiff made the request ensured that "they obtained exactly what they wanted, namely, an initial denial of an unreasonable and bogus request."³² The court ruled the plaintiff's method of requesting public records an abuse of public records laws and "nothing more than a scam."³³ 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."³⁴ The court noted that 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.³⁵ The case is currently on appeal.³⁶

III. Effect of Proposed Changes:

The bill provides that a court must assess and award the reasonable costs of enforcement, including reasonable attorney fees, against the responsible agency if it determines that the:

- Agency unlawfully refused to permit the public record to be inspected or copied; and

²⁹ *Town of Gulf Stream v. O'Boyle, et al.*, Opinion and Order, Case No. 15-80182-CIV-MARRA, U.S. District Court, Southern District of Florida, June 30, 2015 available at <http://law.justia.com/cases/federal/district-courts/florida/flsdce/9:2015cv80182/456973/47/> (last visited Feb. 12, 2016).

³⁰ Tristram Korten and Trevor Aaronson, Miami Herald, Florida Center for Investigative Reporting, *In Lawsuits Statewide, Questions of Profits and Public Records*, (Nov. 9, 2014) available at <http://www.miamiherald.com/news/state/florida/article3683176.html> (last visited Feb. 12, 2016).

³¹ 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).

³² *Id.* at 6.

³³ *Id.*

³⁴ *Id.* at 4.

³⁵ *Id.* at 7.

³⁶ A Notice of Appeal was filed with the First District Court of Appeal in Case Number 1D14-5793 (December 19, 2014). The last action on this case occurred on September 28, 2015, when the court denied oral arguments.

- Complainant provided written notice identifying the public record request to the agency's custodian of public records at least 5 days before filing the civil action, except as provided below.

The complainant is not required to provide written notice of the public record request, as required above, if the agency does not prominently post the contact information for the agency's custodian of public records in the agency's primary administrative building in which public records are routinely created, sent, received, maintained, and requested and on the agency's website, if the agency has website.

A court may not assess and award any reasonable costs of enforcement, including reasonable attorney fees, against the agency if the court determines that the request to inspect or copy the public record was made primarily to harass the agency or cause a violation of ch. 119, F.S.

The bill is effective 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:

The bill requires a court to assess reasonable costs of enforcement, including reasonable attorney fees, if the agency unlawfully refused to permit a public record to be inspected or copied and the complainant provided written notice identifying the public record request to the agency's custodian of public records at least 5 days before filing a civil action. This effectively imposes a requirement on the public to make a public record request in writing, instead of verbally, in order to recover reasonable costs of enforcement and attorney fees. A request may be made verbally, but if the agency unlawfully refuses to honor the request, then the requestor must provide the written notice in order to recover costs and fees.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Private contractors which are agencies under the public records laws may spend less in settlements and attorney fees related to public records requests.

Individuals and groups who file public records lawsuits may incur additional costs to send letters to public records custodians. There would be little or no additional costs, however, to send an email instead of letter.

C. Government Sector Impact:

Governmental entities may spend less in settlements and enforcement costs related to public records requests.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill requires the complainant to provide written notice identifying the public record request to the agency. This may be interpreted either as requiring that the complainant identify a previous record request (date of submitted request) or identify the public record (the document) that was previously requested or both. The written notice is required under the bill for the court to award costs and fees to the complainant when the court also finds that the agency unlawfully refused access to the public record (the document).

VIII. Statutes Affected:

This bill substantially amends section 119.12 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/CS by Fiscal Policy on February 17, 2016:

The CS removes the provisions that allowed a court to not assess reasonable costs of enforcement and attorney fees if it determined:

- That any alleged delay or error in permitting a public record to be inspected or copied was a technical violation of ch. 119, F.S., which amounted to harmless error under the circumstances; or
- The civil action was frivolous, malicious, or *reasonably appears* to have been intended to harass an agency.

CS/CS by Judiciary on February 9, 2016:

This CS differs from the previous version by removing some of the court's discretion to award enforcement costs and attorney fees. This bill specifies circumstances under which a court must award enforcement costs, including attorney fees, and when the court is prohibited from awarding those enforcement costs and attorney fees. The instances in

which the court may not award costs and fees are expanded to include instances in which the request was malicious, reasonably intended to harass the agency, or brought to primarily cause a violation of the public records request laws or if the alleged delay or error was a technical violation that amounted to harmless error.

CS by Governmental Oversight and Accountability on January 26, 2016:

The CS provides that the court may not award enforcement costs if the court determines that the plaintiff made his or her public records request frivolously or in bad faith.

B. Amendments:

None.