

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 Judiciary

BILL: CS/CS/SB 1220

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

SUBJECT: Public Records

DATE: February 11, 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> </u>	<u> </u>	<u>FP</u>	<u> </u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 1220 establishes circumstances under which enforcement costs and attorney fees are permitted and forbidden in an action to require an agency to disclose a public record. A court must award reasonable enforcement costs, including attorney fees, if:

- The complainant provided written notice to the records custodian that clearly and conspicuously identified the record;
- The request was provided at least 5 business days before filing the suit; and
- The agency unlawfully refused the request.

Written notice of the request, however, is not required if the agency does not post the records custodian's contact information in the agency's primary administrative building where the records are generally maintained or if the contact information is not posted on the agency's website.

A court may not award enforcement costs and fees if the court finds that:

- The action or request was frivolous, malicious, or intended to harass the agency or cause a violation of the public records chapter; or
- The delay or error in permitting access to the record was a technical violation that constitutes harmless error.

These changes are in contrast to current law which mandates that a court “shall” assess and award the reasonable cost of enforcement, including reasonable attorney fees, if the court decides that the agency unlawfully refused to permit the public record to be inspected or copied.

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.¹ This right applies to records of the legislative, executive, and judicial branches.²

The Public Records Act, codified in chapter 119, F.S., expressly guarantees every person’s right to inspect and copy any state or local government public record³ at any reasonable time, under reasonable conditions, and under the supervision of the public records custodian.⁴ The Public Records Act also applies to a private contractor if that private business acts on behalf of a governmental entity.⁵

An agency, as defined by chapter 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.⁶ Nor may an agency require an individual to put his or her request in writing as a condition of production.⁷ 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.⁸

Custodian of Public Records

Pursuant to s. 119.011(5), F.S., 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.”

¹ FLA. CONST. art I, s. 24(a).

² *Id.*

³ 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.”

⁴ Section 119.07(1)(a), F.S.

⁵ 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).

⁶ *Bevan v. Wanichka*, 505 So. 2d 1116, 1118 (Fla. 2d DCA 1987).

⁷ *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).

⁸ Op. Att’y Gen. Fla. 80-57, pg. 3 (1980).

A custodian of public records is required to perform statutorily required duties such as maintaining records in fireproof vaults, repairing records and comply with retention schedules set by the Department of State.⁹ In addition, s. 119.07, F.S., provides that a public records custodian has additional duties, which include:

- Acknowledging a public records request and responding to those requests in good faith;¹⁰
- Producing records after redacting exempt information or providing the statutory citation for an exemption if the entire document is exempt;¹¹
- Maintaining records that are the subject of public records litigation;¹²
- Ensuring that those records are secure if public records are provided by remote electronic means;¹³
- Providing supervision if someone wishes to photograph records;¹⁴ and
- Providing certified copies of public records upon payment of a fee.¹⁵

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

Article I, section 24(c), 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.”

Under s. 119.11, F.S., 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.¹⁶ If a court orders an agency to open its records for inspection, the agency must comply within 48 hours.¹⁷

Section 119.12, F.S. provides that if a court finds that an agency unlawfully refused access to a public record, the court must order the public agency to pay costs and attorney fees related to the enforcement lawsuit.¹⁸ An unjustified delay in turning over public records is considered an

⁹ Section 119.021, F.S.

¹⁰ Section 119.07(1)(c), F.S.

¹¹ Section 119.07(1)(d)-(f), F.S.

¹² Section 119.07(1)(g)-(i), F.S.

¹³ Section 119.07(2), F.S.

¹⁴ Section 119.07(3), F.S.

¹⁵ Section 119.07(4), F.S.

¹⁶ Section 119.11(1), F.S.

¹⁷ Section 119.11(2), F.S.

¹⁸ Section 119.12, F.S. 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. Ch. 84-298, s. 7, Laws of Fla. 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.” *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.

unlawful refusal, and a court will award attorney fees even if the delay was not willful or if the delay was due to incompetence.¹⁹

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.²⁰ 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.²¹ The public policy behind awarding attorney fees is to encourage people to pursue their right to access government records after an initial denial.²² In addition, granting attorney fees makes it more likely that public agencies will comply with public records laws.²³

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.²⁴ Open meetings laws also include an attorney fee provision. Section 286.0114(7), F.S., provides:

(a) Whenever an action is filed against a board or commission to enforce this section, the court shall assess reasonable attorney fees against such board or commission if the court determines that the defendant to such action acted in violation of this section. The court may assess reasonable attorney fees against the individual filing such an action if the court finds that the action was filed in bad faith or was frivolous. This paragraph does not apply to a state attorney or his or her duly authorized assistants or an officer charged with enforcing this section.

(b) Whenever a board or commission appeals a court order that has found the board or commission to have violated this section, and such order is affirmed, the court shall assess reasonable attorney fees for the appeal against such board or commission.

Public Records Requests, Settlements and Attorney Fees

Over the past few years, governmental entities have been sued based on their failure to provide public records for what appear to be less about private citizens getting access to public records than generating settlements or attorney fees. Cities often settle the matters because settlements

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).

¹⁹ *Lilker v. Suwannee Valley Transit Authority*, 133 So. 3d 654, 655-656 (Fla. 1st DCA 2014); *Barfield v. Town of Eatonville*, 675 So. 2d 223, 225 (Fla. 5th DCA 1996).

²⁰ *Mazer v. Orange County*, 811 So. 2d 857, 859 (Fla. 5th DCA 2002).

²¹ *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).

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

²³ *Id.*

²⁴ FLA. CONST. art I, s. 24(a).).

are less costly than litigation. For example, the City of Dunedin settled a matter for \$2,500 rather than spending \$10,000 to fight the public records request lawsuit.²⁵

Some public records lawsuits are filed by individuals and some are filed by organizations that appear to be working in concert. 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.²⁶ 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.²⁷ The Town of Gulf Stream filed the federal lawsuit against a resident, the Citizen's Awareness Foundation, Inc., Our Public Records, LLC, 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.²⁸

Citizen's Awareness Foundation and its sister group, Our Public Records, LLC, have filed more than 140 lawsuits across 27 counties.²⁹ The lawsuits are filed against government contractors as well as government entities.

Consumer Rights, LLC, filed a public records lawsuit against Union County, which was ultimately appealed when the trial court refused to grant attorney fees to Consumer Rights, LLC. The First District Court found:

The plaintiff made the request in suspicious email that could not be easily verified, directed it to a general email account that might not be checked by the person having anything to do with the records at issue, waited four months without saying anything and then sued the county, claiming a right to attorney fees.³⁰

²⁵ Mike Brassfield, *Lawsuits from Public Records Group are a Nuisance, Florida Cities Say*, TAMPA BAY TIMES, July 6, 2015, available at <http://www.tampabay.com/news/humaninterest/lawsuits-from-public-records-group-are-a-nuisance-florida-cities-say/2236362>.

²⁶ John Kennedy and Joan Musgrave, *Florida Bill Targets Type of Suit Used by Gulf Stream Resident O'Boyle*, PALM BEACH POST, 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/>.

²⁷ *Supra* at 25.

²⁸ *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 2015 available at <http://law.justia.com/cases/federal/district-courts/florida/flsdce/9:2015cv80182/456973/47/>.

²⁹ Tristram Korten and Trevor Aaronson, Florida Center for Investigative Reporting, *In Lawsuits Statewide, Questions of Profits and Public Records*, (Nov. 9, 2014) available at , <http://fcir.org/2014/11/09/in-lawsuits-statewide-questions-of-profits-and-public-records/>.

³⁰ *Consumer Rights, LLC, v. Union County, Fla.*, 159 So. 3d 882, 885 (Fla. 1st DCA 2015). See also *State Dept. of Economic Opportunity v. Consumer Rights, LLC*, No. 1D15-0383, 2015 WL 9258293 (Fla. 1st DCA 2015).

In this case, the First District Court of Appeal affirmed the lower court's decision to deny attorney fees to the plaintiff. The First District Court found that the manner in which the public records request was made, as well as the fact that the County ultimately provided the requested record when it became apparent that the email was not spam, indicated that there was no refusal to provide the requested records.³¹

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.³² Contractors can be individuals or business entities.³³ 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.³⁴ These duties include keeping public records, providing the public an opportunity to inspect or copy a public record, and redacting exempt information.³⁵ A public agency is required to enforce the terms of its contract if a contractor fails to abide by public records laws.³⁶ This 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.³⁷

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.³⁸ 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.³⁹ Therefore, once a lawsuit is filed, a contractor may also be held 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."⁴⁰

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

Pursuant to s. 119.011(2), F.S., the definition of 'agency' in the Public Records Act includes a "public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." In addition, s. 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

³¹ *Consumer Rights, LLC*, at 886-887.

³² 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.

³³ Section 119.0701(1)(a), F.S.

³⁴ Section 119.0701, F.S. *News and Sun-Sentinel Co. v. Schwab, Twitty and Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992).

³⁵ Section 119.0701(2), F.S.

³⁶ Section 119.0701(3), F.S.

³⁷ Section 287.058(1)(c), F.S., provides that state agency contracts which exceeding \$35,000.00 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. Section 287.058(1), F.S.

³⁸ See ss. 119.011(2), 119.0701(1), and 119.11, F.S..

³⁹ See ss. 119.011(2) and 119.12, F.S. *New York Times Co. v. PHH Mental Health Services, Inc.* 616 So. 2d 27, 29 (Fla. 1993).

⁴⁰ *New York Times Co. v. PHH Mental Health Services, Inc.* 616 So. 2d 27, 29 (Fla. 1993).

agency and is acting on behalf of the public agency.” It is not always clear, however, when a private contractor is ‘acting on behalf of’ an agency and is subject to public records laws.

To determine when a contractor is acting on behalf of a public agency, a totality of factors test may be applied.⁴¹ Some of the factors a court may consider include, but are not limited to:

- 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.⁴²

A contractor’s uncertainty as to whether it is an agency for public records purposes may lead a contractor to believe it is not required to provide public access to its records. If a contractor fails to comply with public records laws because of its uncertainty, a court may not always require the contractor to pay the requestor’s costs and attorney fees.⁴³

Private Contractors and Public Records Lawsuits

Private contractors have also been subject to lawsuits that appear to be more about generating settlements and attorney fees than about the individuals exercising their right to copy and inspect public records. 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.⁴⁴ 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. 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.”⁴⁵

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.”⁴⁶ 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.”⁴⁷ 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 further noted that all of the cases followed a similar pattern.

⁴¹ *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992).

⁴² *Id.* at 1032.

⁴³ *New York Times Co. v. PHH Mental Health Services, Inc.* 616 So. 2d 27, 29 (Fla. 1993); *Stanfield v. Salvation Army*, 695 So. 2d 501, 502 (Fla. 5th DCA 1997).

⁴⁴ *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).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

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.⁴⁸

The denial of attorney fees was affirmed by the First District Court of Appeal on December 16, 2015.⁴⁹

III. Effect of Proposed Changes:

Changes to Current Law

The bill limits access to enforcement costs and attorney fees in an action to require an agency to disclose a public record. This change is in contrast to current law which provides that a court "shall" assess and award the reasonable cost of enforcement, including reasonable attorney fees, if the court decides that the agency unlawfully refused to permit the public record to be inspected or copied. The bill establishes when those costs and fees are permitted and forbidden.

When a Court Must Award Enforcement Costs and Fees

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

- The complainant provided written notice that clearly and conspicuously identifies the public record request to the agency's public records custodian;
- The request was provided at least 5 business days before filing the civil action; and
- The agency unlawfully refused to permit the public record to be inspected or copied.

The complainant, however, is not required to provide written notice of the public record request to the agency's public records custodian if:

- The agency does not post the custodian's contact information in the agency's primary administrative building where the public records are generally created, sent, received, maintained and requested; or
- The contact information is not posted on the agency's website.

When a Court is Prohibited from Awarding Enforcement Costs and Fees

The bill prohibits a court from assessing and awarding the reasonable costs of enforcement, including reasonable attorney fees, against the agency if the court determines that:

⁴⁸ *Id.*

⁴⁹ *Gray v. Lutheran Social Services of Northeast Florida, Inc.*, 179 So. 3d 322 (Table) (Fla. 1st DCA 2015).

- The civil suit or request to inspect or copy the public record was frivolous, malicious, or reasonably appears to have been intended to harass the agency or cause a violation of the public records chapter; or
- An alleged delay or error in permitting the inspection or copying of the public record was a technical violation which amounted to harmless error under the circumstances.

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:

The bill grants greater discretion to judges as to whether they must award attorney fees in actions to enforce public records laws. This may have the effect of reducing the likelihood of an attorney accepting a public records lawsuit if he or she will not be guaranteed fees. This provision may also have the effect of essentially imposing a requirement on the public to make public records requests in writing because the enforcement costs provision requires a written request for records be sent to the records custodian.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of a state tax shares with counties and municipalities.

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:**

Notice period

The 5-day window is not a cure period, as the bill does not foreclose a plaintiff from being awarded enforcement costs.

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 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.